? 146 U.S. 657

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1100~~. ~~781~~ 334

COLLIS P. HUNTINGTON, PLAINTIFF IN ERROR,

vs.

ELIZABETH C. ATTRILL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED MARCH 1, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1100.

COLLIS P. HUNTINGTON, PLAINTIFF IN ERROR,

vs.

ELIZABETH C. ATTRILL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from circuit court of Baltimore city	2	1
Amended bill of complaint	2	1
Agreement as to demurrer	8	7
Demurrer of Elizabeth C. Attrill	8	8
Agreement as to *pro forma* order and as to record	9	8
Order overruling demurrer	9	9
Order of appeal	9	9
Clerk's certificate	9	9
Agreement as to exhibits	9	10
Plaintiff's Exhibit No. 1—Judgment roll from New York supreme court in case of Huntington *vs.* Attrill & Soutter	9	10
Summons	10	10
Complaint	10	11
Answer of Attrill	14	14
Answer of Soutter	16	16
Orders denying new trial, etc.	18	18
Verdict	19	19
Judgment	19	19
Certificate	20	20

JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 12, 1889.

	Original.	Print.
Judgment	21	21
Opinion of the court	22	21
Docket entries	32	25
Dissenting opinion	34	26
Petition for writ of error and allowance of same	42	29
Citation	44	30
Writ of error	45	30
Bond	47	31
Clerk's certificate	49	33

1 STATE OF MARYLAND, *sct:*

At a court of appeals of the State of Maryland, begun and held for the said State, at the city of Annapolis, on the second Monday in January, it being the fourteenth day of said month, in A. D. one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and thirteenth—present (at the hearing of the proceedings hereinafter set forth), the Honorable Richard H. Alvey, chief judge of the said court of appeals, and the Honorables Levin T. H. Irving, George Yellott, Oliver Miller, James McSherry, Frederick Stone, and Wm. Shepard Bryan, associate judges of the said court of appeals—among other were the following proceedings, to wit:

2 In the Circuit Court of Baltimore City.

Amended Bill of Complaint. (*Filed 21st March*, 1888.)

COLLIS P. HUNTINGTON *against* THE EQUITABLE GAS-LIGHT COMPANY OF Baltimore City, Henry Y. Attrill, Henry Y. Attrill, Trustee for Helen F. Attrill, His Wife, and Trustee for Elizabeth C. Attrill, Grace Attrill, and Mary Attrill, and said Helen F. Attrill, Elizabeth C. Attrill, Grace Attrill, and Mary Attrill, Individually.	In the Circuit Court of Baltimore City.

To the honorable the judges of the circuit court of Baltimore city:

The plaintiff, Collis P. Huntington, a resident of Westchester county, New York, having heretofore brought his bill of complaint in this court against the Equitable Gas-Light Company of Baltimore City, Henry Y. Attrill, trustee for Helen F. Attrill, his wife, and trustee for Elizabeth C. Attrill, Grace Attrill, and Mary Attrill, and against said Helen F. Attrill, Elizabeth C. Attrill, Grace Attrill, and Mary Attrill individually, and having obtained permission from this honorable court to amend said bill of complaint, doth now bring this his amended bill of complaint against the Equitable Gas-Light Company of Baltimore City, Henry Y. Attrill, who is a resident of the town of Goderich, in the Dominion of Canada; Henry Y. Attrill, trustee for Helen F. Attrill, his wife, and trustee for Elizabeth C. Attrill, Grace Attrill, Mary Attrill, and against said Helen F. Attrill, Elizabeth C. Attrill, Grace Attrill, and Mary Attrill individually, also residents of said town of Goderich, and thereupon said plaintiff complains and says:

First. That on or about the eighteenth day of February, in the year 1880, the said defendant, Henry Y. Attrill, together with certain other persons, filed in the office of the secretary of state of the State of New York a certain certificate for the formation of the

Rockaway Beach Improvement Company, Limited, and thereafter such proceedings were taken that on or about the 29th day of February, 1880, the said secretary of state issued unto the said Henry Y. Attrill and others, the directors in the said company, the certificate of organization whereby said Rockaway Beach Improvement Company, Limited, became and was a corporation under the acts of the State of New York.

Second. That the amount of the capital stock of said com-
3 pany was the sum of $700,000.00, divided into 7,000 shares of $100.00 each, and the purpose of said company was the purchase of land at Rockaway Beach, in Queens county, in the State of New York, and also to build thereon a hotel, with bath-houses, piers, and such other accessories as were necessary for the carrying on of hotel business at a seaside watering place, and the principal place of business of said corporation was at Rockaway Beach, in said county of Queens, in said State of New York.

Third. That on or about the fifteenth day of June, 1886, the plaintiff recovered in the New York supreme court for Kings county, in a suit wherein the said Collis P. Huntington was plaintiff and Henry Y. Attrill and a certain William K. Soutter were defendants, a judgment against the defendants for the sum of $100,240.03, with interest from said date, which said judgment has never been paid, secured, or satisfied; and the plaintiff further states that the cause of action in the said judgment arose in June, 1880; that the said plaintiff, on the 15th day of June, 1880, advanced unto a certain corporation formed under the laws of the State of New York and entitled "The Rockaway Beach Improvement Company, Limited," of which the said Henry Y. Attrill was an incorporator and director, the sum of $100,000.00, to be repaid on demand; that the purpose of said company was to purchase land at Rockaway Beach, in the county of Queens, in the State of New York, and to construct thereon a hotel, bath-houses, piers, and other accessories necessary or usual to the carrying on of a hotel business at a seaside watering place; that the amount of said capital stock of said company was $700,000.00, divided into 7,000 shares of $100.00 each; that the advance so made to said company by this plaintiff of $100,000.00 was secured by the promissory note of a certain Benjamin E. Smith, the general manager of said company, executed in New York on the fifteenth day of June, 1880, whereby the said party promised to pay on demand unto said Rockaway Beach Improvement Company, Limited, or order, for value received, the said sum of $100,000.00, which said note was thereupon by said company duly endorsed as follows: "The Rockaway Beach Improvement Company, Limited, by B. E. Smith, general manager," and said note, so executed and endorsed, was thereupon delivered to this plaintiff as security for such advance, and at the same time, to secure the payment of said note, the said company deposited with the plaintiff two hundred of its first-mortgage bonds, each of the par value of one thousand dollars; that on the 14th day of August, 1880, said note was duly presented for payment, but was not paid, of all of which due notice was given to said company; that this plaintiff, on the 21st day of

March, 1883, after due notice, sold said 200 first-mortgage bonds at public auction, at the exchange salesrooms, in the city of New York; that the proceeds of said sale, after the payment of the necessary expenses, was the sum of $932.00, which was credited by the plaintiff on said note; that, except as aforesaid, no part of said note has been paid and nothing was ever paid on account of said loan; that on or about the 26th day of February, 1880, the said Henry Y. Attrill was elected one of the directors of said company and duly accepted said election and thereafter continued to act as one of the directors of said company until after the 29th day of January, 1881; that the said defendant, as director of said company, on or about the 30th of June, 1880, signed and verified by his oath a certain certificate under the statutes of the State of New York, wherein the said Henry Y. Attrill made oath that
4 the amount of the capital paid in in full of said corporation was the sum of $700,000.00, being the full amount of the capital stock of said company, whereas, in truth, none of said capital stock had been paid in in full or in part, either in money, labor done, or property received or otherwise; but, on the contrary, one-half of said capital stock was subscribed for, but nothing was ever paid on account of said subscription, and on or about the 27th day of April, 1880, the said Rockaway Beach Improvement Company, Limited, had issued unto the said Henry Y. Attrill the other half of its capital stock in exchange for his interest in the real property situated at Rockaway Beach, on which the hotel building and other improvements were erected or intended to be erected, and that at the time when said exchange was made the interest of said Attrill in said real property, including his interest in all the improvements thereon, was of no value whatever over and above the encumbrances thereon and the debts which the acceptance of said property in exchange for said stock obligated said company to pay; that the said certificate was false, and that the said plaintiff is informed and believes that the said Henry Y. Attrill, when he signed and verified said certificate and caused the same to be recorded, knew that the same was false, as above stated; that the said corporation continued as such until on or about the eighth day of March, 1882, when, in an action then pending in said court, wherein the people of the State of New York were plaintiffs and the said company was defendant, final judgment was duly made and entered, declaring that said company was unable to pay its debts, was insolvent and has been insolvent since July, 1880, and all the rights, privileges, and franchises of said corporation were forfeited and the same was dissolved; that at the time of its dissolution as aforesaid the said company was indebted to the plaintiff and to other creditors to an amount far in excess of its assets; that by the law of the State of New York all the stockholders of the company were liable to pay all its debts, each to the amount of the stock held by him, and the defendant, Henry Y. Attrill, was liable at said date and on the 14th day of April, 1882, as such stockholder to the amount of three hundred and forty thousand dollars, the amount of stock held by him, and

was on both said dates also severally and directly liable as a director, having signed the false report above mentioned, for all the debts of said company contracted between the 26th day of February, 1880, and the 29th of January, 1881, which debts aggregate to more than the whole value of the property owned by said Attrill.

The plaintiff is also informed and believes and so avers that the said Henry Y. Attrill was, in the month of March, 1882, and has ever since remained indebted individually in a large amount over and above the debts for which he was liable as a stockholder and director in the Rockaway Beach Improvement Company, Limited, as aforesaid.

And the plaintiff further states that the obligation upon which the said judgment for $100,240.03 as aforesaid was recovered by this plaintiff on said fifteenth day of June, 1886, against the said Henry Y. Attrill, arose when the said Henry Y. Attrill made the said false and fraudulent affidavit that the amount of the capital stock of said company has been paid in in full; whereas neither the same nor any part thereof has been paid as required under the laws of the State of New York, and that by reason of said false and fraudulent affidavit the said Henry Y. Attrill, jointly and severally with the other parties to said false and fraudulent affidavit, became and were responsible unto the creditors of said corporation for the liabilities of the same, including therein the sum of $100,000.00, hereinbefore mentioned as having been advanced by this plaintiff unto the said Rockaway Beach Improvement Company, Limited, on said 15th day of June, 1880, all of which matters and things will more fully and at large appear in a duly exemplified copy of the record of proceedings in the said cause of Collis P. Huntington against Henry Y. Attrill *et al.*, in the supreme court of the State of New York for Kings county, filed with the original bill of complaint in this cause and marked "Plaintiff's Exhibit No. 1," which is prayed to be taken as a part of this amended bill of complaint; which said action, as it appears from record, was begun by this plaintiff on the 21st day of March, 1883, and the said judgment so obtained is still in full force and virtue and has never been paid, satisfied, or secured, and that execution was issued thereon against said Attrill in the State of New York, and the same returned unsatisfied, and that there was no property of said Attrill whereon to levy.

And this plaintiff further states that he is informed and believes that the said Henry Y. Attrill is insolvent and unable to pay his debts, and that he has secreted and concealed all his property for the purpose of defrauding his creditors.

Fourth. And the said plaintiff further states that the said Equitable Gaslight Company of Baltimore City is a corporation incorporated by the State of Maryland by an act passed at a session of the General Assembly of said State, begun and held at the city of Annapolis on the second day of January, 1867, by chapter 132 of said acts, whereby the said corporation was authorized and empowered to lay along and under the streets, lanes, and alleys of the said city of Baltimore pipe to carry the gas from their manufacturing estab-

lishment for the purpose of supplying light to any dwelling house or building within said corporation; and that the said Henry Y. Attrill, in association with a certain C. K. Garrison, of the city of New York, under the charter aforesaid, constructed the buildings, pipes, improvements, etc., of said Equitable Gaslight Company of Baltimore City, which said construction was completed early in the year 1882, and that on or about the month of April in said year (1882) the said Henry Y. Attrill received a large amount of the capital stock of said Equitable Gaslight Company of Baltimore City, the exact amount of which this plaintiff cannot precisely state, but he is informed and believes that the same was in the neighborhood of five thousand shares, each of the par value of $100.00 and of the present market value of $25.00 to $30.00; and that subsequent to said April, 1882, and after the acquisition of said stock, the said Henry Y. Attrill, in fraud of this plaintiff as an existing creditor, on the 14th day of April, 1882. transferred 1,750 shares into his own name as trustee for his said wife and daughters, to the following amounts, and represented by various certificates, to wit:

Certificate No. 105, in trust for Helen F. Attrill, for	300 shares.
Certificate No. 200, in trust for Helen F. Attrill, for	700 shares.
Certificate No. 106, in trust for Elizabeth C. Attrill, for	175 shares.
Certificate No. 199, in trust for Elizabeth C. Attrill, for	75 shares.
Certificate No. 107, in trust for Grace Attrill, for	175 shares.
6 Certificate No. 197, in trust for Grace Attrill, for	75 shares.
Certificate No. 109, in trust for Mary Attrill, for	175 shares.
Certificate No. 198, in trust for Mary Attrill, for	75 shares.
Amounting to said number of	1,750 shares.

And this plaintiff is informed and believes and charges that the said Helen F. Attrill was the wife of said Henry Y. Attrill, and that said Elizabeth, Grace, and Mary Attrill were his daughters, and, at the time of said transfer, neither the said Helen F. Attrill nor the said Elizabeth, Grace, and Mary Attrill paid unto the said Henry Y. Attrill value for the said shares of stock so transferred unto the said Henry Y. Attrill, as trustee, for their use and benefit, but that the said transfers aforesaid were without due consideration and in fraud of the creditors of the said Henry Y. Attrill and in fraud of this plaintiff, and were for the purpose of placing the property of the said Henry Y. Attrill beyond the reach of his said creditors, and especially to prevent the said plaintiff from rendering the same liable to his claim, the suit whereon was begun, as hereinbefore stated, in the said supreme court of the State of New York on or about the 21st day of March, 1883.

The plaintiff further states that he was, in the month of June, 1880, and has ever since remained, domiciled and resident in the State of New York, his present residence being in Westchester, in that State; that during the period of time from February, 1880, to December 6th, 1884, the defendant, Henry Y. Attrill, was continu-

ously domiciled and resident in the State of New York; that the transfer of stock above set forth was made by him while so domiciled and resident, and was made in New York city, where the principal and transfer office of the said company was at the time located, and where its stock, transfer, and other books were then kept, where its president and secretary resided, and where its stock was transferrible and where all its transfers thereof were made.

And the plaintiff further alleges that the said transfer of stock by the said Henry Y. Attrill was made without valuable consideration and with intent to delay, hinder, and defraud his creditors, and especially with the intent to delay, hinder, and defraud this plaintiff of his lawful suits, damages, debts, and demands against the said Attrill arising out of plaintiff's said claim against him as the stockholder of said Rockaway Beach Improvement Company, Limited, and out of the cause of action on which the judgment hereinbefore recited has been recovered, and that said transfer was, by the laws of the State of New York, as well as by those of the State of Maryland, fraudulent and void as against the creditors of said Attrill, including the creditors of said Rockaway Beach Improvement Company, Limited, and was and is fraudulent and void as against this plaintiff.

Fifth. That the said pretended transfers of said 1,750 shares of stock of said Equitable Gas-Light Company of Baltimore City unto the said Henry Y. Attrill, as trustee for his wife and daughter, unless set aside and annulled by a court of equity, will deprive this plaintiff of all his rights and interests of every sort*h* therein to which he is entitled as a creditor of said Henry Y. Attrill at the time when said fraudulent transfers were made.

7 Sixth. That the said pretended transfers were wholly without legal consideration, were fraudulent and void, and should be set aside by a court of equity.

To the end, therefore, that the said transfers of said 1,750 shares of the capital stock of the said Equitable Gas-Light Company of Baltimore City unto the name of Henry Y. Attrill, purporting to be trustee for his said wife, Helen, and his daughters, Elizabeth C., Grace, and Mary, may be declared to be fraudulent, null, and void and executed for the purpose of defrauding this plaintiff out of his claim as existing creditor against the said Henry Y. Attrill when said transfers were made, and that the said Equitable Gas-Light Company of Baltimore City may be enjoined from transferring the same unto any other parties, and that the said Henry Y. Attrill, and that the said Helen F. Attrill, his wife, and the said Elizabeth C. Attrill, Grace Attrill, and Mary Attrill may make full discovery, under oath, as to the said transfers of said stock unto the said Henry Y. Attrill, as trustee for said parties, and therein state all the circumstances connected therewith, and that they, the said Henry Y. Attrill, as trustee aforesaid, and the said Helen F., Elizabeth C., Grace, and Mary Attrill, and the said Equitable Gas-Light Company of Baltimore City, may be restrained by injunction from transferring the said certificates representing the said shares of stock or any of them unto any parties; that the said certificates of the capital stock

of the said Equitable Gas-Light Company so standing in the name of Henry Y. Attrill, as trustee of said parties, may be adjudged, ordered, and decreed by this honorable court — be brought into court and cancelled, and that the said 1,750 shares of the capital stock of said corporation may be decreed to be subject to the claim of this plaintiff on the judgment aforesaid, and that the same may be ordered to be sold by a trustee to be appointed by this honorable court, and that new certificates in lieu thereof shall be issued by the said Equitable Gas-Light Company for said parties purchasers, and that your plaintiff, the said Collis P. Huntington, may have such other and further relief as his case may require—

May it please your honor to grant unto your plaintiff the writ of subpœna, directed to the said Equitable Gas-Light Company of Baltimore City and the said Henry Y. Attrill, respectively, commanding it and him to be and appear in this honorable court, at some certain day to be named therein, and answer the premises and abide by and perform such decree as may be passed therein; and also an order of publication against the said Henry Y. Attrill, if he be not found in this State, Henry Y. Attrill, trustee as aforesaid, the said Helen F. Attrill, Elizabeth C. Attrill, Grace Attrill, and Mary Attrill, the other defendants, non-residents of the city of Baltimore and State of Maryland, commanding them to be and appear in this court, at some certain day to be named therein, and answer the premises and abide by and perform such decree as may be passed therein.

And as in duty bound, etc.

COWEN & CROSS,
Solicitors for Plaintiff.

STATE OF NEW YORK,
City and County of New York, } *ss:*

Isaac E. Gates, being duly sworn, deposes and says that he has read the foregoing bill of complaint and knows the contents thereof, and that all the matters and things therein stated are true to
8 the best of his knowledge, information, and belief, and that he is the agent and attorney-in-fact of the plaintiff in respect to this suit and duly authorized on behalf of the plaintiff to commence and carry on the same.

Subscribed and sworn to before me this 19th day of March, 1888.

J. F. C. CROW,
[NOTARIAL SEAL.] 33, *Notary Public, New York County.*

Agreement as to Demurrer. (*F'ed 28th March*, 1888.)

COLLIS P. HUNTINGTON
vs.
HENRY Y. ATTRILL. } In the Circuit Court of Baltimore City.

It is agreed that the demurrer heretofore filed on behalf of Mrs. Helen F. Attrill to the original bill shall be treated as having been

repeated to the amended bill in due form and as though sworn to in accordance with the rules, and that for the purposes of the demurrer the bill shall be treated as embodying the New York act, passed June 21st, 1875, entitled "An act to provide for the organization and regulation of certain business corporations," and that "The Rockaway Beach Improvement Company, Limited," was incorporated under the provisions of the said act.

JOHN K. COWEN AND
H. L. BOND, JR., *For P'ff.*
WILLIAM A. FISHER,
For Def't.

Demurrer of Elizabeth C. Attrill. (*F'd 25th September*, 1888.)

COLLIS P. HUNTINGTON
vs.
THE EQUITABLE GAS-LIGHT COMPANY OF BALTIMORE and Others. } In the Circuit Court of Baltimore City.

The defendant, Elizabeth C. Attrill, demurs to the whole of the plaintiff's amended bill of complaint, and for cause of demurrer shows—

1. That the bill shows that the claim of the plaintiff is for the recovery of a penalty against the defendant, Henry Y. Attrill, arising under a statute of the State of New York.

2. Because the amended bill does not state a case which entitles him to any relief in a court of equity in this State.

S. T. WALLIS,
WILLIAM A. FISHER,
Solicitors for Elizabeth C. Attrill.

9 STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that on this 25th day of September, A. D. 1888, in open court, in the circuit court of Baltimore city, personally appeared William A. Fisher, one of the solicitors of the petitioner, Elizabeth C. Attrill, and made oath in due form of law that the within demurrer to be filed by the petitioner in the above-entitled cause is not intended for delay.

ALVIN ROBERTSON, *Clerk.*

Agreement as to pro Forma Order and as to Record. (*F'd 29th September*, 1888.)

COLLIS P. HUNTINGTON
vs.
HENRY Y. ATTRILL *et al.* } In the Circuit Court of Baltimore City.

It is agreed that an order be entered by the judge of the circuit court of Baltimore city overruling the demurrer to the amended — in this case filed by the defendant, Elizabeth C. Attrill, and that an

appeal be at once entered upon her behalf from such order, and that the usual affidavit by her and bond be dispensed with, and that in making up the record the clerk shall insert merely the amended bill, the demurrer of said Elizabeth C. Attrill, order overruling the demurrer, and this agreement, so that the record can be gotten up to the October term, 1888, of the court of appeals; and the agreement filed March 28th, 1888, shall be treated as applying to Elizabeth C. Attrill's demurrer and shall be inserted in the record.

COWEN & CROSS,
Att'ys for Pl't'ff.
WILLIAM A. FISHER,
For Def't, Helen F. Attrill.

Order Overruling Demurrer. (*Filed 29th September*, 1888.)

HUNTINGTON *vs.* ATTRILL *et al.* } In the Circuit Court of Baltimore City.

Ordered by the circuit court of Baltimore, this 29th day of September, 1888, that the demurrer of Elizabeth C. Attrill be overruled.

EDW'D DUFFY.

Attrill's Order for Appeal. (*F'd 29th September*, 1888.)

HUNTINGTON *vs.* ATTRILL *et al.* } In the Circuit Court of Baltimore City.

Mr. Robertson, clerk:

10 Enter an appeal to the court of appeals of Maryland from the order overruling the demurrer of Elizabeth C. Attrill.

WILLIAM A. FISHER,
S. T. WALLIS,
For Elizabeth C. Attrill.

Which said appeal being by the court here also granted, it is thereupon ordered by the court here that a transcript of the record and proceedings in the cause aforesaid be transmitted to the court of appeals of Maryland, as agreed upon; and the same is transmitted accordingly.

Test: ALVIN ROBERTSON, *Clerk.*

In testimony that the foregoing is truly taken from the records and proceedings of the circuit court of Baltimore city in the therein-entitled cause—

I hereunto subscribe my name and affix the seal
Seal's Place. of the circuit court of Baltimore city aforesaid this 29th day of September, A. D. 1888.

ALVIN ROBERTSON,
Clerk of the Circuit Court of Baltimore City.

(Filed October 11th, 1888.)
2—1100

ATTRILL *vs.* HUNTINGTON. } In the Court of Appeals of Maryland.

It is agreed that the annexed paper-writing is a copy of the exemplification of judgment which was filed as Exhibit No. 1 with the bill of complaint, and that it be printed as part of the record in this cause.

WILLIAM A. FISHER,
For Appellant.
COWEN & CROSS,
For Appellee.

COLLIS P. HUNTINGTON *vs.* THE EQUITABLE GAS-LIGHT COMPANY OF BALTIMORE CITY, HENRY Y. ATTRILL, Trustee, *et al.* } Circuit Court of Baltimore City.

PLAINTIFF'S EXHIBIT NO. 1.

The People of the State of New York, by the grace of God free and independent, to all — whom these presents may come, Greeting:

Know ye that we have inspected the files and records of our supreme court, at the city of Brooklyn, in the county of Kings, — do find a certain judgment-roll remaining there on file of record in the words and figures following, to wit:

Kings County Seal.

11 COLLIS P. HUNTINGTON, Plaintiff, *against* HENRY Y. ATTRILL and WILLIAM K. SOUTTER, Defendants. } N. Y. Supreme Court. Trial to be had in the County of Queens. Summons.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated March 21, 1883.

STEWART & BOARDMAN,
Plaintiff's Attorneys.

Office and post-office address, No. 49 Wall street, New York city, New York.

COLLIS P. HUNTINGTON, Plaintiff,
against
HENRY Y. ATTRILL and WILLIAM K. SOUTTER, Defendants.

N. Y. Supreme Court. Trial to be held in the County of Kings.

The plaintiff, appearing herein by Stewart & Boardman, his attorneys, complains of the defendants, and for cause of complaint alleges and shows to the court as follows:

I. That on or about February 18, 1880, a certificate for the formation of the Rockaway Beach Improvement Company, limited, was filed by the defendant, Henry Y. Attrill, together with certain other persons, the promoters of said company, in the office of the secretary of state of the State of New York, pursuant to chapter 611 of the laws of 1875, entitled "An act to provide for the organization and regulation of certain business corporations," and thereafter such proceedings were taken that on or about February 29, 1880, said secretary of state issued to the defendants and others, the directors of said company, the certificate of organization thereof provided for by section 7 of said act, which said last-mentioned certificate was thereupon duly recorded.

II. That the object for which said company was formed, as aforesaid, was the purchase of land at Rockaway Beach, in the county of Queens, and the building thereon of a hotel, together with bath houses, piers, and a theatre, and such other accessories as are necessary or usual for the carrying on of a hotel business at a seaside watering place.

III. That the amount of capital stock of said company was seven hundred thousand dollars, divided into seven thousand shares of one hundred dollars each, and its principal place of business was at Rockaway Beach aforesaid.

IV. That on June 15, 1880, at the city of New York, the plaintiff lent to said company for the legitimate purposes thereof the sum of $100,000, upon condition that is should be repaid on demand, and that to secure the repayment of said loan one Benjamin E.
12 Smith, the general manager of said company, made and signed his promissory note in writing, dated at New York on that day, wherein and whereby he promised to pay on demand to said company or order, for value received, said sum of $100,000, and he, being thereto duly authorized, thereupon duly indorsed said note as follows: "The Rockaway Beach Improvement Co., limited, by B. E. Smith, gen'l manager," and delivered the same, so indorsed, to the plaintiff.

V. That as security for the payment of said note said company deposited with the plaintiff on June 15, 1880, 200 first-mortgage bonds of said company, each for the par value of $1,000.

VI. That on August 14, 1880, said note was duly presented for payment, but was not paid, of all which due notice was given to said company.

VII. That on March 21, 1883, the plaintiff, after due notice, sold at public auction, at the Exchange Sales Rooms, in the city of New York, said 200 first-mortgage bonds, and that the proceeds of said

sale, after payment of the necessary expenses thereof, was the sum of $932.00, which was credited by the plaintiff upon said note.

VIII. That except as aforesaid no part of said note has been paid, and nothing has been paid on account of said loan.

IX. That on February 26, 1880, the defendants were elected directors of said company. They duly accepted said election, and thereafter continued to act as directors of said company until after January 29, 1881.

X. That the defendants, as directors of said company, on June 30, 1880, signed and severally verified each by his oath a certain certificate pursuant to section 37 of said act, a true copy of which is hereto annexed, marked "Exhibit A," and made a part of this complaint; and the defendants, as such directors, on or about July 1, 1880, caused said certificate to be recorded in the office of the clerk of Queens county and in the office of the secretary of state of the State of New York.

XI. That said last-named certificate was false in a material representation, to wit, in that it represented that all the capital stock of said company had been paid for in cash, whereas, as the plaintiff is informed and believes, no part of said capital stock was paid for in cash.

XII. That said last-named certificate was false in another material representation, to wit, in that it represented that the whole of the capital stock had been paid in in full, and that such part thereof as had not been paid for in money was paid for in labor done or property actually received for the use and legitimate purposes of said company at its fair value, pursuant to section fourteen of said act, whereas, as the plaintiff is informed and believes, no part of the capital stock of said company was paid for either in money, labor done, or property received or otherwise; but, on the contrary, one half of said capital stock was subscribed for, but nothing has ever been paid on account of said subscription, and the other half was, about April 27, 1880, issued to Henry Y. Attrill in exchange for his interest in the real property situated at Rockaway Beach, upon which said company's hotel building and other improvements were erected or intended to be erected, and that at the time when said exchange was made the interest of said Attrill in said real property, including his interest in all the improvements thereon, was of no value whatever over the incumbrances thereon and the
13 debts which the acceptance of said property in exchange for said stock obligated said company to pay.

XIII. That, as the plaintiff is informed and believes, each of the defendants, when he signed and verified said last-named certificate and caused the same to be recorded as aforesaid, knew that the same was false, as above stated.

XIV. That said company continued to be a domestic corporation as aforesaid from February 29, 1880, to March 8, 1882, but that on said last-named date, at a special term of the supreme court of the State of New York, held at the old capitol building in the city of Albany, in an action then pending in said court, wherein The People of the State of New York were plaintiffs and said company was

defendant, final judgment was duly made and entered declaring that said company was unable to pay its debts, was insolvent, and had been insolvent since July, 1880, and adjudging that said company had forfeited all its rights, privileges, and franchises and dissolving said company.

Wherefore the plaintiff demands judgment against the defendant for $99,068, together with the costs of this action.

STEWART & BOARDMAN,
Plaintiff's Attorneys.

CITY AND COUNTY OF NEW YORK, *ss:*

Collis P. Huntington, being duly sworn, says that he is the plaintiff above named, and that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

COLLIS P. HUNTINGTON.

Sworn to before me this 22d day of March, 1883.

W. W. CONKLIN,
Notary Public, N. Y. Co., No. 89.

EXHIBIT A.

THE ROCKAWAY BEACH IMPROVEMENT COMPANY, LIMITED.

Certificate of Full-Paid Stock.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

We, the undersigned, the president and a majority of the directors of the Rockaway Beach Improvement Company, limited, being severally duly sworn, each for himself says that he is a director and R. Prindeville the president of the Rockaway Beach Improvement Company, limited; that the amount of capital paid in in full is the sum of seven hundred thousand dollars, being the full amount of the capital stock of said company.

Dated New York, June 30th, 1880.

R. PRINDEVILLE, *President.*
B. E. SMITH.
H. Y. ATTRILL.
C. F. SMITH.
W. K. SOUTTER.

Subscribed and sworn to before me by the five subscribers severally this 30th day of June, 1880.

EDWARD STROUSE,
Notary Public, N. Y. Co.

14 COLLIS P. HUNTINGTON *against* HENRY Y. ATTRILL and WILLIAM K. SOUTTER. } Supreme Court.

The defendant, Henry Y. Attrill, by John E. Parsons, his attorney, reserving to himself the objections—

1. That the amended complaint does not state facts sufficient to constitute a cause of action;

2. That the court in this action has no jurisdiction of the alleged cause of action;

3. That the plaintiff has improperly joined different and inconsistent causes of action, in that by his amended complaint he both claims that the said certificate represented that all the capital stock of the Rockaway Beach Improvement Company, limited, was paid in cash, and was false, for the alleged reason that no part was paid in cash; and also claims that the said certificate represented that the capital stock was not all paid in cash, but that part was paid in labor done or property received at its fair value, and that the said part of the said capital stock was not so paid;

4. That the plaintiff has not joined as parties to this action Napoleon Le Brun, Pierre L. Le Brun and Michael L. Le Brun, Andrew J. Robinson and Edward H. Wallace, Collis P. Huntington, Frederick Taylor, John McClave, Henrietta J. Warner and Jas. Thompson, who claim to be creditors of said company, and who as such have brought actions against this defendant similar to that brought by the plaintiff, and who, as this defendant is advised and believes and pleads, are necessary parties to this action;

5. That the plaintiffs have not joined as parties to this action R. Prindeville, B. E. Smith, and C. F. Smith, the other subscribers to said certificate, who, as this defendant is advised and pleads, are necessary parties to this action—

For answer to the amended complaint says:

First. He admits the truth of the averments contained in the first, second, third, and tenth sections of the complaint.

Second. As to the averments of the fourth, fifth, sixth, seventh, eighth, and fourteenth sections of said complaint, he says that he has no knowledge or information sufficient to form a belief whether the same are or are not true as therein alleged, except that he admits that said company continued to be a domestic corporation from the time of its incorporation until the appointment of a receiver, as hereinafter mentioned.

Third. In regard to the ninth section of said complaint, this defendant admits that he was elected a director of said company at the time in the complaint stated, and that he accepted such election and continued to act as such director until the appointment of a receiver of the said company, which appointment was made in the month of August, 1880, but he did not continue to act as such director after the last-mentioned date.

Fourth. With regard to the allegations of the eleventh, twelfth, and thirteenth sections of the amended complaint, this defendant says that he denies that the said certificate contained either of the

representations which the amended complaint alleges; he denies that the same is or was false in any respect.

15. The whole of the capital stock of the company was, on or about April 27th, 1880, in pursuance of arrangements made previously, received by him for his interest in the real property situated at Rockaway Beach, upon which the said company's buildings and other improvements were intended to be erected. The value of this defendant's interest in the said property was greatly increased by railroad communications and other advantages which he secured for the same, and the benefit of which was acquired by the company.

For the entire capital stock of the company, or its proceeds, the company received this defendant's interest in the property; the stock thereby became full-paid stock, and was exempted from the liability claimed in this action. The stock was fairly and in good faith issued to this defendant for his said interest. He fully and in good faith believed at the time that his said interest was of the value of the said capital stock; he avers that the same was of such value, and he alleges that the plaintiffs had notice and knew that it was for such interest in real estate that such capital stock has been issued; that they either did know or that they had every opportunity of learning what was the value of the said interest; that any indebtedness by the said company to them was incurred with such knowledge, notice, and opportunity, and that by incurring such liability the plaintiffs acquiesced in the truth of said certificate, and that they are now estopped from making any assertion to the contrary.

Fifth. This defendant denies each and every averment of the said 11th, 12th, and 13th sections except as herein admitted.

This defendant admits that there was a formal subscription for one-half the said capital stock, but he alleges that with the knowledge and by the request of all interested both the said subscriptions and residue of the said stock were issued and used as herein alleged.

Sixth. And as to each of the allegations of the complainant not hereinbefore specifically answered this defendant denies that he has knowledge or information sufficient to form a belief as to the truth of any of them.

Wherefore he hereby demands that the plaintiff's complaint may be dismissed with costs.

JOHN E. PARSONS,
Said Defendant's Attorney, No. 111 *Broadway, N. Y.*

CITY AND COUNTY OF NEW YORK, *ss:*

Henry Y. Attrill, being duly sworn, deposes and says hat he is one of the defendants above named; that he has read the foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

H. Y. ATTRILL.

Sworn to before me this sixth day of Dec., 1884.

JNO. J. LOUTH,
Notary Public, Kings County.

Cert. filed in N. Y. Co.

16 *Amended Answer.*

COLLIS P. HUNTINGTON, Plaintiff, *against* WILLIAM K. SOUTTER and HENRY Y. ATTRILL, Defendants.	N. Y. Supreme Court, County of Kings.

The defendant, William K. Soutter, for his separate amended answer to the plaintiff's amended complaint herein, reserving to himself the objections—

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. That the plaintiff has not joined as parties to this action Napoleon Le Brun, Pierre Le Brun, and Michael Le Brun, Andrew J. Robinson, Edward H. Wallace, Harvey Fisk, Alfrederick S. Hatch, John McClave, Henriette J. Warner, and James Carney, who claim to be creditors of the Rockaway Beach Improvement Company, and who as such have brought actions against this defendant similar to that brought by the plaintiff, and who, as this defendant is advised and believes and therefore pleads, are necessary parties to this action.

3. That the plaintiff has not joined as parties to this action R. Prindeville, B. E. Smith, and C. F. Smith, the other subscribers to the said certificate mentioned in the complaint, who, as this defendant is advised and believes and therefore pleads, are necessary parties to this action.

Further answering the said amended complaint—

First. Admits the allegations contained in the first, second, third, and tenth paragraphs or sections of the said amended complaint.

Second. And, answering the allegations of the fourth, fifth, sixth, seventh, eighth, and fourteenth paragraphs or sections of the said amended complaint, he denies any knowledge or information thereof sufficient to form a belief as to any of the allegations therein contained, except that he admits that said company continued to be a domestic corporation from the time of its incorporation until the appointment of a receiver thereof, as herein mentioned.

Third. And, answering the ninth paragraph or section of said amended complaint, this defendant admits and avers that he was elected a director of the said company at or about the time in the amended complaint alleged, and in some matters and at some times acted as such until the appointment of a receiver of said company, which appointment was made in the month of August, 1880, but that he was in a minority of the directors of said company, and neither was able to nor did he control nor is he responsible for the action of the said company nor for the acts and conduct of said Benjamin E. Smith in respect thereto; and this defendant further says

that he did not continue to act as such director after the month of August, 1880.

Fourth. And, answering the allegations of the twelfth paragraph or section of the said amended complaint, this defendant admits and avers that the whole capital stock of said company was, on or about the 27th day of April, 1880, fairly and in good faith issued to and received by the defendant, Henry Y. Attrill, in payment for his interest in the real property situated at Rockaway Beach, upon
17 which the said company's hotel building and other improvements were to be erected, and which said interest in said real property was fully and fairly worth, in the judgment of this defendant, the full value of said capital stock so issued and delivered as aforesaid, and the said property was actually received by the said company for the use and legitimate purposes thereof.

And the defendant denies each and every other allegation contained in the said twelfth paragraph or section of said amended complaint, and he denies each and every averment contained in the eleventh and thirteenth paragraphs or sections of said amended complaint, except as hereinbefore specially admitted.

Fifth. And, further answering the said amended complaint, this defendant avers that the said capital stock of the said company was issued to said Henry Y. Attrill in payment for his interest in the said real estate, pursuant to section fourteen of the said act in the complaint averred, and this defendant fully and in good faith believed at the time that the said interest in the said real estate was of the value of the said capital stock, and he avers the truth to be that the same was of such value, and he alleges that before and at the time of the said alleged loan by the plaintiff to the said Benjamin E. Smith the said plaintiff knew or had knowledge or notice that the said capital stock of said company had been issued in payment for the said interest in the said real estate, and that he either did know or that he had every opportunity to learn what was the value of the said interest, and that any loan made by him was with such notice, knowledge, or opportunity, and that in making any such loan he acquiesced in the truth of the said certificate, and he is thereby estopped from now making any assertion to the contrary.

Sixth. And, further answering, the defendant avers that, in connection with others, in good faith, he signed and swore to the certificate, a copy of which is annexed to the complaint; and he denies that the said certificate contained either of the representations in the amended complaint alleged, and he denies that the same was or is false in any respect.

Seventh. And, further answering, this defendant denies each and every allegation in the amended complaint contained not hereinbefore specially admitted or denied.

Eighth. And, further answering, this defendant denies that by reason of the matters and things in the amended complaint alleged either of the defendants became or were or are, either jointly or severally, indebted to the plaintiff in the sum alleged or in any sum whatever.

Wherefore the defendant demands judgment for the dismissal of the plaintiff's complaint herein, with costs.

VANDERPOEL, GREEN & CUMING,
Attorneys for Defendant Soutter,
No. 2 Wall Street, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

William K. Soutter, being duly sworn, says that he is one of the defendants herein; that the foregoing amended answer is true, 18 to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

W. K. SOUTTER.

Sworn to before me this 7th day of April, 1885.

JOHN J. FINNEY,
Notary Public, N. Y. and Kings Cos.

At a trial term of the supreme court of the State of New York, held at the county court house, in the city of Brooklyn, county of Kings, on the 10th day of July, 1886.

Present: Hon. Edgar M. Cullen, justice.

COLLIS P. HUNTINGTON
against
HENRY Y. ATTRILL and WILLIAM K. SOUTTER.

This action having duly come on for trial at a circuit court held on the 28th day of May, 1886, and a verdict for $99,068 having been rendered in favor of the plaintiff and against the defendants, and the defendants having thereupon moved this court to set aside said verdict and for a new trial upon the minutes and upon all the grounds stated in the code, now, after hearing Coles Morris, Esq., of counsel for the defendant Attrill, and Delos McCurdy, Esq., of counsel for the defendant Soutter, on behalf of said motion, and Gen. Ben. F. Tracey and Albert B. Boardman, Esq., of counsel for the plaintiff, in opposition thereto, it is—

Ordered, That said motion be, and the same is hereby, denied.

At a trial term of the supreme court of the State of New York, county of Kings, held at the court-house, in the city of Brooklyn, this 27th day of May, 1886.

Present: Hon. Edgar M. Cullen, justice.

COLLIS P. HUNTINGTON, Plaintiff,
against
WILLIAM K. SOUTTER, Impleaded with HENRY Y. ATTRILL, Defendant.

This action having been tried at the present May term of this

court, before a justice thereof and a jury, the jury having rendered a verdict for plaintiff for the sum of ninety-nine thousand and sixty-eight $\frac{0}{100}$ dollars, and defendant, Wm. K. Soutter, by Delos McCurdy, his counsel, having thereupon moved before said justice upon his minutes, in accordance with the provisions of § 999 of the Code of Civil Procedure, and upon the grounds therein specified, to set aside said verdict, and that a new trial be granted to said defendant Soutter, and counsel for plaintiff having been heard in opposition thereto—

Ordered, That said motion to set aside the verdict aforesaid and for a new trial be, and the same is hereby, denied.

At a circuit court held in and for Kings county, at the court-house, in the city of Brooklyn, on the 28th day of May, 1886.

Present: Hon. Edgar M. Cullen, justice.

19

COLLIS P. HUNTINGTON, Plaintiff,
against
HENRY Y. ATTRILL & Ano., Defendants.

This cause having been called for trial in its order on the calender, and twelve trial jurors were duly drawn, empanelled, and sworn to try the same, the jury come into court and say that they find a verdict for the plaintiff for the sum of $99,068.00, and so they say all.

Counsel for defendants moved the court for a new trial on the minutes on all the grounds mentioned in section 999 of the Code of Civil Procedure. Motion denied.

On motion of defendants, the court granted sixty days' stay after entry of judgment to make a case.

On motion of plaintiff, the court granted an extra allowance of $1,000.

An extract from the minutes.

JOHN M. RANKEN, *Clerk.*

Judgment.

COLLIS P. HUNTINGTON, Plaintiff,
against
HENRY Y. ATTRILL and WILLIAM K. SOUTTER, Defendants.
} New York Supreme Court, Kings County.

The issues in this action having regularly been brought on for trial, before Mr. Justice Edgar M. Cullen and a jury, at a circuit of this court held on the twenty-fifth day of May, 1886, and a verdict for the plaintiff having been duly rendered on the twenty-eighth day of May, 1886, for the sum of ninety-nine thousand and sixty-eight dollars, and an extra allowance of one thousand dollars having been granted to the plaintiff by the court, and the plaintiff's costs and disbursements having been taxed at one hundred and seventy-two $\frac{3}{100}$ dollars: Now, on motion of Stewart & Boardman, attorneys for said plaintiff—

It is ordered, adjudged, and decreed that said plaintiff, Collis P. Huntington, recover of said defendants, Henry Y. Attrill and William K. Soutter, the sum of ninety-nine thousand and sixty-eight dollars, found by the jury, with one thousand one hundred and seventy-two $\frac{3}{100}$ dollars for extra allowance, costs, and disbursements, making together the sum of one hundred thousand two hundred and forty $\frac{3}{100}$ dollars, and that the plaintiff have execution therefor.

JOHN M. RANKEN, *Clerk.*

Dated June 15, 1886.

All which we have caused by these presents to be exemplified and the seal of our said court for said county to be hereunto affixed.

Witness Hon. Joseph F. Barnard, presiding justice of our supreme court in and for the second judicial department of said State, this 20th day of July, 1887, and in the 112th year of the Independence of the United States.

JOHN M. RANKEN, *Clerk.*

20 I, Joseph F. Barnard, presiding justice of the supreme court of the State of New York in and for the second judicial department thereof, do hereby certify that John M. Ranken, whose name is subscribed to the preceding exemplification, is the clerk of the county of Kings and clerk of the supreme court in and for said county, and that full faith and credit are due to his official acts.

I further certify that the seal affixed to said exemplification is the proper seal of said court for said county, and that the attestation thereof is in due form of law and by the proper officer.

Witness my hand, at the city of Brooklyn, this 20th day of July, in the year 1887.

J. F. BARNARD,
Presiding Justice of the Supreme Court of the State of New York in and for the Second Judicial Department.

STATE OF NEW YORK, *County of Kings,* } ss:

I, John M. Ranken, clerk of the county of Kings, and also clerk of the supreme court of said county in and for the second judicial department of said State (said court being a court of record), do hereby certify that the Hon. Joseph F. Barnard, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the second judicial department, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

Kings County Seal.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 20th day of July, in the year 1887.

JOHN M. RANKEN, *Clerk.*

21 ELIZABETH C. ATTRILL *vs.* COLLIS P. HUNTINGTON. } Court of Appeals of Maryland. January Term, 1889.

The appeal in this case, standing ready for hearing, was argued by counsel for the respective parties, and the proceedings have since been considered by the court.

It is thereupon, this eighth day of February, 1889, by the court of appeals of Maryland and by the authority thereof adjudged and ordered that the order of the circuit court of Baltimore city, dated the 29th day of September, 1888, from which this appeal was taken be, and the same is hereby, reversed with costs in this court and in the court below, and the bill dismissed.

R. H. ALVEY.
OLIVER MILLER.
LEVIN T. H. IRVING.
WM. SHEPARD BRYAN.
GEO. YELLOTT.

22 ELIZABETH C. ATTRILL. *vs.* COLLIS P. HUNTINGTON. } Court of Appeals of Maryland. January Term, 1889.

Judge BRYAN delivered the opinion of the court:

Collis P. Huntington filed a bill in equity to set aside certain transfers of stock made by Henry Y. Attrill. They were made to himself as trustee for his wife and daughters. The present appeal involves the stock transferred for the benefit of Elizabeth Attrill, the appellant, who is one of his daughters. It is alleged in the bill of complaint that Attrill made these transfers of stock without valuable consideration and with intent to delay, hinder, and defraud his creditors, and especially the complainant, who is alleged to be a creditor. The bill is filed by the complainant in his own behalf to procure the payment of his own debt. No other creditor has been made a party to the suit, and no claims against this stock are presented for adjudication except those asserted by the complainant in his own interest. The bill shows that the complainant, in June,
23 1886, recovered against Attrill and one Soutter a judgment for nearly a hundred thousand dollars in the supreme court of New York for the county of Kings, and it is alleged that the cause of action on which the judgment was rendered arose in June, 1880, and was in this wise: That a certain corporation had been formed under the laws of New York entitled "The Rockaway Beach Improvement Company, Limited," of which the said Attrill was an incorporator and director; that the complainant loaned the said corporation one hundred thousand dollars to be repaid on demand; that only nine hundred and thirty-two dollars of this sum had been repaid; that the amount of the capital stock of the corporation was seven hundred thousand dollars; that Attrill, as director of the corporation, signed and verified by his oath a certain certificate under the statutes of New York, stating that the full amount of the

capital stock of the corporation, to wit, the sum of seven hundred thousand dollars, had been paid in; that said Attrill when he signed and swore to said certificate knew that it was false, and that the law of New York made Attrill liable to pay the debts of the corporation by reason of his making under oath said false certificate. An exemplification of the judgment was filed with the bill of complaint. It showed that judgment was demanded and obtained against Attrill and Soutter on the ground that they had made the false cer-
24 tificate under oath. We were informed at the argument that, by agreement of counsel, the New York statute was to be considered as set forth in the bill. A demurrer was filed by the defendant, which was overruled by the court below.

The twenty-first section of the statute is in these words: "If any certificate or report made or public notice given by the officers of any such corporation shall be false in any material representation all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof." Act of 1875, chapter 611 (New York.) For doing any of these forbidden acts the officers of a corporation are made liable for its debts. No inquiry is to be made whether the creditor has been deceived and induced by deception to lend his money or to give credit, or whether he has incurred loss to any extent by the inability of the corporation to pay, nor is the recovery limited to the amount of the loss sustained. All that is necessary to show is that the act has been committed, and thereupon any creditor is entitled to recover the full amount of his debt. In an action for an injury to the person or property of an individual it must be first shown that his rights have been invaded, and then the extent of the damage must be shown. It is true that in
25 some cases the law allows a recovery far beyond the amount of actual damage, as where the injury was inflicted from fraudulent or malicious motives; but in these cases the recovery is founded on the injury to rights of person or property, and the circumstances which justify an exceptional measure of damages must be proved in evidence. There is a very marked and obvious difference between these cases and a case where a statute enacts that because of the commission of a certain act, without reference to any other circumstance, a party shall incur a liability. Because thou hast done this thing, thou shalt pay the debts of another. It is extremely difficult to conceive that the statute was not intended to provide a punishment for the obnoxious acts. The payment of a sum of money which a party would not otherwise be obliged to pay is no less a punishment because it is inflicted through the medium of a civil suit instead of criminal prosecution; and such has been the uniform opinion of the courts of the State where this statute was enacted. In Mechanics' Bank *vs.* Bliss, 35 New York, 412, an action was brought against the defendants, as trustees of a corporation created under the general act of 1848, to recover a debt due to the plaintiffs from the corporation, and the question was whether the action was barred by limitations. The code prescribed six
26 years as the period of limitations where the action was upon a

liability created by statute other than a penalty or forfeiture, and three years for "an action upon a statute for a penalty or forfeiture where action is given to the party aggrieved." The defendants were alleged to be liable under the twelfth and thirteenth sections of the act.

The twelfth section required every corporation organized under the act to make a report annually, within twenty days from the first of January, stating the amount of capital and the proportion actually paid in and the amount of existing debts, and provided that "if any of said companies shall fail so to do all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such report shall be made." The thirteenth section enacted that "if the trustees of any such company shall declare and pay any dividend the payment of which would render it insolvent or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of the company then existing and for all that shall thereafter be contracted while they shall respectively continue in office." We will quote somewhat freely from the opinion of the court: "Under these sections the trustees are declared to be jointly and severally liable for all the debts of
27 the company in case of a violation of their provisions. The liability, it must be observed, is not limited to the injury or damage sustained by the creditors in consequence of the violation; but upon failure to file the report or upon making a prohibited dividend, however small or trifling the amount, the trustees are subjected to the payment of the whole amount of the debts of the company then existing and for all that shall be contracted in the one case before the report shall be made, and in the other while they shall respectively continue in office. These provisions appear to be severely primitive, inflicted on grounds of public policy, for the protection of creditors and the prevention of frauds upon the public in respect to the financial condition of such corporations. It is clear that the liability of the trustees is not imposed as an indemnity, because it has no relation to the actual loss or injury sustained by the party in whose favor the action is given. The action depends wholly upon the statute. There never was any such remedy or cause of action, in whole or in part, at common law. If any action could have been maintained at common law for either of the causes mentioned in sections 12 and 13 of the general act in relation to manufacturing corporations, it could extend only to the actual damages or injury sustained; but those elements have nothing to
28 do with the actions given by these sections, nor, indeed, is it necessary that the creditor should have sustained any injury or damage by reason of a violation of those sections. It is sufficient that the party prosecuting the action should be a creditor when the violation of the law takes place. The right of action is given to the creditors, and they must be held to be the parties aggrieved.

For these reasons I am satisfied that the sections 12 and 13 impose a penalty or a disability in that nature, to which a shorter

limitation of three years applies." In Stokes *vs.* Stickney, 96 New York, 323, this decision was fully approved. Referring to what was said in reference to the twelfth section, the court said: "Since that decision the subject of actions under that section of the statute has frequently been under the consideration of this court, with the uniform conclusion that the actions therein provided for are penal in their character and are not in any respect based upon the theory of affording compensation to the injured party for damages sustained by reason of the omission complained of," and they quote a number of decisions of the irown court. In this State, in construing a similar provision in a statute, it was held "that the liability of the director was not one arising upon contract, but one imposed upon him by the statute as a wrong-doer, and therefore in the nature of a penalty." National Bank *vs.* Price, 33 Maryland, 498.

29 Section 10 of the New York act of 1848 makes the stockholders of every company incorporated under its provisions individually liable to the creditors of the company in a sum equal to the amount of their stock until the whole of the capital stock is paid in and a certificate thereof is made and recorded. A distinction is well established by the decisions between this liabiiity and that imposed by the twelfth section of the act. In the former case the statute withdraws from the stockholders the protection of the corporate character and leaves them liable as copartners to the amount of their stock. In the latter case the liability is created by statute and is in the nature of a penalty imposed for neglect of duty. Wiles *vs.* Suydam, 64 New York, 176. The distinction is mentioned in the Plymouth Bank case, 33 Maryland, and many cases are there cited which maintain it. It is also approved by the Supreme Court of the United States in Flash *vs.* Conn, 109 U. S., and Chase *vs.* Curtis, 113 U.S., and in Norris *vs.* Wrenschall, 34 Md., but in this last case all the reasoning and illustrations of the New York cases are not adopted.

We think that we must hold that the liability imposed by the twenty-first section of the New York act of 1875 is a penalty. If this be so, it cannot be enforced in this State. Upon this point the authorities agreed with great harmony. In the case of the Plymouth Bank this court said: "It is well settled that no State will

30 enforce penalties imposed by the laws of other States. Such laws are universally considered as having no extra territorial operation." The same doctrine has recently been declared by the Supreme Court of the United States. Flash *vs.* Conn., 109 U. S., 376; Wisconsin *vs.* Pelican Insurance Company, 127 U.S., 290. We must, however, notice the fact that a judgment has been obtained for this penalty. A judgment merges the original cause of action so that a suit cannot be again maintained upon it. It is also conclusive evidence of its existence in the form and under the circumstances stated in the pleadings. In the classification of legal subjects it is called a debt of record because of the obligation to pay it which is imposed on the party against whom it is rendered, but the nature of a transaction is not changed by the reduction of it to a judgment. If we could suppose that a judgment was obtained on

a contract to commit murder, would any one maintain that the judgment had removed the turpitude of the contract, or that the law would mitigate its condemnation of a grievous crime because of a change in the form with which it was clothed? It is unnecessary to pursue this subject because the Supreme Court of the United States has recently decided the question here presented. In Wisconsin *vs.* Pelican Insurance Company, 127 U. S. Reports, 292,
31 293, a suit was brought on a judgment for a penalty, and it was decided that the judgment in its "essential nature and real foundation" was the same as the original cause of action, and that a suit could not be maintained upon it beyond the limits of the State in which it was rendered.

It is alleged in the bill of complaint that the above-mentioned corporation was dissolved in March, 1882, by a judgment of a court in New York; that at the time of its dissolution it "was indebted to the plaintiff and to other creditors to an amount far in excess of its assets; that by the law of the State of New York all the stockholders of the company were liable to pay all its debts, each to the amount of the stock held by him, and the defendant, Henry Y. Attrill, was liable at said date and on the 14th day of April, 1882, as such stockholder to the amount of three hundred and forty thousand dollars, the amount of stock held by him, and was on both said dates also severally and directly liable as a director, having signed the false report above mentioned for all the debts of said company contracted between the 26th day of February, 1880, and the 29th day of January, 1881, which debts aggregate to more than the whole value of the property owned by said Attrill." This liability is asserted to exist independently of the judgment. It cannot be maintained on the New York
32 & 33 statute already mentioned, because by the twenty-fifth section a stockholder is not personally liable for a debt of the corporation, except in cases where an action to recover it has been brought against the corporation within two years after it became due, and here no such action has been brought. The judgment against Attrill for having made the false report certainly merges all right of action against him on this account; but let us assume that Attrill was liable at the times mentioned in this clause of the bill of complaint and on the grounds therein stated. This liability is barred by the Maryland Statutes of Limitations, and this defence properly arises under the *the* demurrer filed in this case. Belt *vs.* Bowie, 65 Md., 355.

Upon the whole, it appears to us that the complainant has no cause of action which he can maintain in this State.

Order reversed and bill dismissed.

Docket Entries.

Order was reversed and bill dismissed in this case on the 8th day of February, 1889, and execution awarded for the sum of $— costs in the circuit court of Baltimore city, and $97.35 costs in the court of appeals of Maryland.

34 ATTRILL *vs.* HUNTINGTON. } Court of Appeals of Maryland. January Term, 1889.

Dissenting opinion of Judge Stone, in which Judge McSherry concurs.

It is with some diffidence that I venture to differ in this case from the majority of the court. I look upon the principal point as a Federal question, and am governed in my views more by my understanding of the decisions of the Supreme Court of the United States than by the decision of the State courts.

The act of Congress, made in pursuance of the Constitution, provides that the judgments rendered by the State courts "shall have such faith & credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence said records are or shall be taken."

Notwithstanding the comprehensive language here used, several limitations have been made by the decisions of the Supreme Court to the effect of such judgments. The only one necessary to mention and which affects this case is that stated by Judge Marshall,
35 in the case of the Antelope, that "the courts of no country execute the penal laws of another."

I concede to the fullest extent that rule, but the question remains, What are the penal laws of a State, and does this case come properly within that rule?

In the case of Wisconsin *vs.* The Pelican Insurance Company, 127 U. S., the State of Wisconsin instituted suit in the Supreme Court of the United States upon a judgment recovered in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a Wisconsin statute for not making the returns to the insurance commissioner as required by law. By the Wisconsin statute every foreign insurance company doing business in that State was required to deposit in January of each year, in the office of the insurance commissioner, a statement of the business of the corporation, and in default thereof it should forfeit five hundred dollars a month for every month it should continue to do business after such default, and it was made the duty of the insurance commissioner to institute suit for such forfeiture in the name of the State, and one-half of the sum recovered by such suit was to be paid into the State treasury and the other half to the insurance commissioners to pay the costs.

36 Under this act a judgment was recovered by the State of Wisconsin against the Pelican Insurance Company, which the State attempted to enforce in the Supreme Court by action brought there. This the Supreme Court decided could not be done, and says in the decision:

"The statute of Wisconsin under which the State recovered in one of her own courts the judgment now here sued on was in the strictest sense a penal statute imposing a penalty upon any insurance company of another State doing business in Wisconsin with-

out having deposited with the proper officer of the State a full statement of its property and business during the previous year.

The cause of action was not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty when recovered would accrue to the State, and to be paid one-half into her treasury and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. It is immaterial whether by the law of Wisconsin the prosecution must be by indictment or by action. In whatever form the State pursues her right to punish the offence against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offence."

37 The court in the same case also says: "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

It will be readily seen from these extracts that the Supreme Court in this opinion, so much relied on, does not extend the rule that no country will execute the penal laws of another beyond suits brought in the name of the State for the recovery of penalties for an infraction of its revenue or municipal laws, and was careful to state in the paragraph just quoted that the cause of action was not any private injury, but solely the offence committed against the State. I think the cause of this careful definition of what actions come within the rule can easily be found in the previous decision of the same court.

By a statute of Conneticut it was provided that the president and secretary of each corporation organized under their law should annually in January and July make a statement of its affairs and deposit it with the town clerk, and if that duty was intentionally neglected or refused to be performed the officer so neglecting should

38 be liable for all debts of the corporation contracted during the period of such neglect. A creditor of a corporation sued the president under this act for a debt due to him by the corporation in the circuit court of the United States and the case (Steam Engine Co. *vs.* Hubbard, 101 United States) went eventually to the Supreme Court of the U. S.

In deciding the case the Supreme Court said that the statute was penal and must be strictly construed, but affirmed the judgment of the circuit court upon the ground of insufficient proof against the president.

So in Chase *vs.* Curtis, 113 U. S. —, the action was brought in the circuit court of the U. S. upon a judgment recovered by the creditor of a corporation against the trustees of a corporation, and the facts are somewhat similar to those in the Connecticut case. By a statute of New York the trustees of certain corporations were required

to file reports of the condition of such corporations, and upon failure to do so the trustees were made liable for the debts of the corporation. Suit was brought against trustees and judgment was recovered. Action was brought on that judgment, and the case went to the supreme court.

That court decided that the action was penal and must be construed strictly, and decided that the judgment itself was not in that case sufficient evidence of the debt, and the judgment was given for defendants.

39 One purpose for which I have cited these cases is to show the different meaning that the supreme court has given to the word penal. In the two last-cited cases the supreme court declared in unmistakable terms that the statutes under which the cases were brought were penal statutes, and must be construed strictly; and yet they entertained jurisdiction and decided the cases upon their merits.

In the case just cited, 127 U. S., the court said that the statute was penal, and refused to entertain jurisdiction. That court evidently used the term penal in two different senses. The term penal seems to be applied rather indiscriminately to both criminal and civil laws, but I think that court has given us a rule by which we can determine what cases come within the rule that no country will execute the penal laws of another. It says in the citation, from 127 U. S. —, heretofore given, that the rule covers crimes and misdemeanors and actions brought by the State for an infraction of its laws; but where the State law gives an individual the right to recover damages or claims for the non-observance by other individuals or corporations of its laws such infractions do not come within the rule.

But it is argued that the case of Price in 33 Maryland is decisive of this, and, although this suit is upon a judgment and Price's

40 case was not that the essential nature of a case is not changed by a judgment, I think the determination in Price's case was correct, although I think the reasons assigned are not in accord with the decisions of the Supreme Court. I think the decision in Price's case correct because no State is bound by the rules of comity or convenience to try cases *ex delicto* arising under purely local statutes of another State and unknown to the common law, and that was Price's case.

I think the Supreme Court, in 127 U. S., meant to confine the operation of the rule that no country will execute the penal laws of another to such laws as are properly classed as criminal. It is not very easy to give any brief definition of a criminal law. It may perhaps be enough to say that in general all breaches of duty that confer no rights upon an individual or person and which the State alone can take cognizance of are in their nature criminal, and that all such come within the rule, but laws which, while imposing a duty, at the same time confer a right upon the citizens to claim damages for its non-performance are not criminal.

If all the laws of the latter description are held penal in the sense of criminal, that clause in the Constitution which relates to records and judgments is of comparatively little value.

41 There is a large and constantly-increasing number of cases

that may in one sense be termed penal but can in no sense be classed as criminal. Examples of these may be found in suits for damages for negligence in causing death, for double damages for the injury to stock where railroads have neglected the State laws for fencing in their tracts [tracks], and the liability of officers of corporations for the debts of the company by reason of their neglect of a plain duty imposed by statute.

I cannot think that judgments on such claims are not within the protection given by the Constitution of the United States.

I therefore think the order in this case should be affirmed. I have merely ventured to state my conclusions, without any attempt whatever at an elaborate argument or citation of authorities. These views have been, I think, sustained by several of the State courts, but I have only thought it necessary to refer to the decisions of the Supreme Court, as I think the question a Federal one.

42 (Copy.)

To the Honorable Richard Henry Alvey, chief justice of the court of appeals of Maryland:

The petition of Collis P. Huntington respectfully represents that a final judgment has been rendered in the court of appeals of Maryland in a suit therein pending wherein the said Collis P. Huntington was defendant in error and appellee and Elizabeth C. Attrill was the appellant on appeal from the circuit court of Baltimore city in a cause wherein the said Elizabeth C. Attrill, the Equitable Gas-Light Company of Baltimore City, Henry Y. Attrill, Henry Y. Attrill, trustee for Helen F. Attrill, his wife, and trustee for Elizabeth C. Attrill, Grace Attrill, and Mary Attrill, and the said Helen F. Attrill, Grace Attrill, and Mary Attrill individually, and the said final judgment and order of the said court of appeals of Maryland ordered and adjudged that the said bill of complaint filed in the circuit court of Baltimore city by the said Collis P. Huntington against the said parties should be dismissed; that the said court of appeals is the highest court of law or equity in the State of Maryland in which a decision in the said suit could be had; that in said suit a right and privilege are claimed under the Constitution and statutes of the United States, and the decision is against the right and privilege set up and claimed by your petitioner under said Constitution and statutes, and that in said suit there is drawn in question the validity of a statute of and an authority exercised under the United States, and the decision is against the valid-

43 ity of such statute and of such authority; all of which appears upon the face of the record accompanying this application:

Wherefore, to the end that the said judgment of the said court of appeals of Maryland may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, your petitioner prays that a writ of error may be allowed, and that

a citation may issue in the same manner as if the said judgment had been rendered in a circuit court of the United States.

JOHN K. COWEN,
E. J. D. CROSS, &
HUGH L. BOND, JR.,
Counsel for Collis P. Huntington, Plaintiff and Appellee.

The above petition is granted and writ of error is allowed as therein prayed.

R. H. ALVEY,
Chief Judge of the Court of Appeals of Maryland.

Annapolis, Feb'y 15th, 1889.

[Endorsed:] Feb'y 19th, 1889.

44 The United States of America to Elizabeth C. Attrill, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Maryland, wherein Collis P. Huntington is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard Henry Alvey, chief judge of the court of appeals of Maryland, this 15th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

R. H. ALVEY,
Chief Judge of the Court of Appeals of Maryland.

Service of copy of the above citation admitted this 16th day of February, 1889.

WILLIAM A. FISHER,
Per W. C. B.,
Att'ys for Elizabeth C. Attrill.

[Endorsed:] Filed February 19th, 1889.

45 THE UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the honorable judges of the court of appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Elizabeth C. Attrill, appellant, and Collis P. Huntington, appellee, wherein was drawn in question the construction of a clause of the Constitution or statute of the United States, and the decision was against the right or privilege specially set up or claimed under the said clause of the said Constitution or statute, a manifest error hath

happened, to the great damage of the said Collis P. Huntington, as by his complaint appears, we, being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme
46 Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

[The Seal of the Circuit Court, Maryland.]

JAS. W. CHEW,
Clerk Circuit Court U. S.

Allowed by the Honorable Richard Henry Alvey, chief judge of the court of appeals of Maryland.

[Endorsed:] Filed February 19th, 1889.

47 Know all men by these presents that we, Collis P. Huntington, of the town of West Chester, in the State of New York, and Richard T. Wilson, of New York, in the State of New York, and John B. McDonald, of the city of Baltimore, in the State of Maryland, are held and firmly bound unto Elizabeth C. Attrill, the Equitable Gas-Light Company of Baltimore City, Henry Y. Attrill, Henry Y. Attrill, trustee for Helen F. Attrill, his wife, and trustee for Elizabeth C. Attrill, Grace Attrill, and Mary Attrill, and the said Helen F. Attrill, Grace Attrill, and Mary Attrill, individually, in the full and just sum of thirty thousand dollars, to be paid unto the said parties, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the city of Annapolis, in the State of Maryland, in a suit depending on appeal from the circuit court of Baltimore city in the court of appeals of Maryland between the said Collis P. Huntington as plaintiff and the said Elizabeth C. Attrill, the Equitable Gas-Light Company of Baltimore City, Henry Y. Attrill, Henry Y. Attrill, trustee for Helen F. Attrill, his wife, and trustee for Elizabeth C. Attrill, Grace Attrill, and Mary Attrill, and said Helen F. Attrill, Grace Attrill, and Mary Attrill, individually, judgment was rendered against the said Collis P. Huntington,

146 U.S. 657

Office Supreme Court U. S.
FILED.
MAR 26 1890
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the U. S.

October Term, 1889,

No. 1100.

COLLIS P. HUNTINGTON, PLAINTIFF IN ERROR,

vs.

ELIZABETH C. ATTRILL.

MOTION AND BRIEF ON THE PART OF THE DEFENDANT IN ERROR.

S. T. WALLIS,
WILLIAM A. FISHER,
for Defendant in Error.

JOHN MURPHY & CO., PRINTERS AND PUBLISHERS, BALTIMORE.

IN THE

Supreme Court of the U. S.

October Term, 1889,

No. 1100.

COLLIS P. HUNTINGTON, PLAINTIFF IN ERROR,

vs.

ELIZABETH C. ATTRILL.

MOTION AND BRIEF ON THE PART OF THE DEFENDANT IN ERROR.

To the Honorable the Judges of the Supreme Court of the United States:

The Defendant in Error respectfully moves the Court to dismiss the Writ of Error in this case, because:

1. There is in reality no Federal question involved.

2. If the Court should hold that there is a Federal question in the case, the same will be found to have been decided by the State Court, in plain conformity with the rulings of this Court in the recent case of Wisconsin *vs.* The Pelican Insurance Company (127 U. S., 290), and other, previous, cases.

3. Because there is another and controlling question, not Federal, in the case, upon which the decree below was practically, and might have been exclusively based, and upon which the case must necessarily be decided in favor of the ~~Plaintiff~~ Defendant in Error, if the cause should be remanded.

The Defendant in Error, in accordance with the 6th Rule, further respectfully moves the Court to affirm the decree below, because the alleged Federal question, on which it is claimed that this Court has jurisdiction to entertain the Writ of Error, is (under the rulings of this Court) so "frivolous" as to need no further argument, and the Writ of Error was taken for delay only.

Brief.

On the 14th of April, 1882, being the owner of 1,750 shares of the capital stock of the Equitable Gas Light Company of Baltimore City, a Maryland corporation, Mr. Henry Y. Attrill transferred it, in several parcels, into his name, as Trustee for his wife, Helen T. Attrill, and for several of his children respectively (p. 5 of the printed Transcript).

In the year 1880, Mr. Attrill, with others, had procured the incorporation, under the laws of the State of New York, of a company known as the Rockaway Beach Improvement Company, limited, with a capital stock of $700,000, Mr. Attrill being a director as well as an incorporator.

On the 15th day of June, in the same year, Mr. Huntington, the Plaintiff in Error, loaned to this Company the sum of one hundred thousand dollars. On the 30th day of June, 1880, Mr. Attrill, as a director of the Company, signed and verified by his oath a certificate, required by the Statute Law of the State of New York, wherein it was stated that the amount of the capital of said corporation paid in, was the sum of $700,000, being the full amount of the capital stock (Transcript, pp. 4 and 13). The

Company having made default in August, 1880, in the repayment of the loan, Mr. Huntington, on the 21st day of March, 1883, brought his action in the New York Supreme Court, for the County of Kings, against Mr. Attrill, to recover the debt of the Company from him, upon the ground that the statement made in the affidavit, that the stock had been paid up, was false and fraudulent, and that for this reason, by force of the New York Statute, the directors who united in it had become responsible to the creditors of the corporation for its liabilities (Transcript, pp. 4, 10–13.)

This action having been brought to trial, the verdict was against Mr. Attrill, and judgment was entered against him, in the month of June, 1886.

In the month of March 1888, Mr. Huntington filed his Bill of Complaint in the Circuit Court of Baltimore City, in which he averred the facts already stated, and charged that the transfers of the stock of the Equitable Gas Light Company, made by Mr. Attrill, as above, were voluntary, in fraud of his creditors and the plaintiff, and had been made for the purpose of placing his property beyond the reach of his creditors, and especially to prevent the plaintiff from rendering the same liable to his claim under the New York Statute. The prayer was, that the transfers might be decreed to have been fraudulent and void, and executed for the purpose of defeating the plaintiff's claim as an existing creditor of Mr. Attrill; that further transfers might be enjoined and the stock sold for the benefit of the plaintiff (Transcript, pp. 5, 6 and 7). All necessary parties were made. The defendant in error demurred. Her demurrer was overruled, whereupon she appealed to the Court of Appeals of Maryland, where the order, overruling the demurrer, was reversed, and the Bill of Complaint was dismissed (Transcript, p. 25). A Writ of Error to this Court was then sued out by Mr. Huntington, upon the ground, that in the said suit a right and privilege was claimed by him under the constitution and laws

of the United States; that the decision was against the right and privilege so claimed; that there was drawn in question the validity of a Statute of and an authority exercised under the United States; and that the decision was against the validity of such Statute and authority (p. 29).

The Federal question, which is alleged by the Plaintiff in Error to exist in the cause, is claimed to arise under article 4, section 1, of the Constitution of the United States, and Section 905 of the Revised Statutes. The 21st section of the Statute of New York, under which the action was brought and prosecuted in the Supreme Court of that State, provided that, "If any certificate or report made, or public notice given by the officers of any such corporation, shall be false, in any material representation, all the officers who have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof" (Transcript, p. 22). The Court of Appeals of Maryland held that this was an enactment of a penal nature, which could not be taken notice of or enforced by the Courts of Maryland. It was maintained by the Plaintiff in Error that, while the Maryland Courts would not have entertained a direct action for the penalty, upon the Statute of New York, they were still bound, under the Federal Constitution, to give effect to the judgment which had been rendered therefor in the New York Court. The Court of Appeals, however, declined to do this, holding, upon the authority of the then recent judgment of this Court, in the case of the State of Wisconsin *vs.* The Pelican Insurance Company, above referred to, that its duty was, to enquire into the original cause of action in New York, and still to refuse to enforce the penalty for which recovery was there had, notwithstanding it had been made to assume the form of a judgment (Transcript, pp. 23–25). The Court held that a Maryland decree, founded on the New York judgment for the penalty, would be just as much an enforcement of the

penalty, as if it were a direct judgment rendered for the same as an original cause of action.

It is submitted that this ruling of the Court of Appeals is so evidently correct, even if a Federal question was really involved, that the Writ of Error must be regarded as "frivolous," in the sense in which that word is used by the Court, in such cases; that it is, in fact, and can only be prosecuted, for purposes of delay, to harass and embarrass the owners of the stock in controversy; and that the Defendant in Error is entitled either to an affirmance of the judgment of the Court of Appeals, or to a dismissal of the Writ of Error. The decision in the case of Wisconsin *vs.* The Pelican Insurance Company is so recent, and so fully applicable in disposing of the present controversy, that the delays of another Writ of Error upon the same subject ought not to be tolerated.

Going Behind the Judgment.

Before considering, however, the distinctions sought to be drawn, on behalf of the Plaintiff in Error, between that case and the one at bar, it is proper to call the attention of the Court to the fact, that there is no need of invoking the Wisconsin case, in order to establish the proposition, here, that where a judgment is presented to a Court for affirmative action, it has the right to go behind the judgment, for the purpose of "ascertaining whether the claim is really one of such a nature that the Court is authorized to enforce it" (127 U. S., p. 293). This doctrine has long been held by the Courts of Maryland (Evans *vs.* Sprigg, 2 Md., 457), and is so fully recognized elsewhere (Freeman on Judgments, Sec. 244) as to need only the confirmation which it has received from this Court, to make it axiomatic. But, conclusively as the doctrine would sustain the contention of the Defendant in Error, if she were compelled to rely on it, she is relieved from that necessity, by the fact that the whole

case of the Plaintiff in Error is made to rest, by his own pleadings, and must substantially rest, if he has any case at all, upon his original cause of action and not upon his judgment. All the equities that he asserts are dependent upon the accrual of his cause of action and the time when it accrued, and he accordingly prays the Court to go behind his judgment and seek his equities in his cause of action. He does not sue on his judgment, nor set it up as the foundation of his claim. On the contrary, his case is (Rec. pp. 2, 3, 4 and 5), that as far back as June, 1880, and before the institution of the suit in which the judgment was rendered (which was not brought till March 21st, 1883), Attrill had become indebted, under the laws of New York, to all the creditors of the Rockaway Beach Improvement Company, including the Plaintiff in Error, by reason of his having filed the alleged false certificate; that he was so indebted at the time when he transferred the stock in controversy (*i. e.* on the 14th of April, 1882) to his wife and daughters; and that such transfer, by the mere force and reason of his said indebtedness then existing, was fraudulent and void. The judgment is only introduced (p. 4.) to show the amount of the indebtedness as subsequently ascertained by its rendition, on the 15th day of June, 1886. The law of New York, under which Attrill is alleged to have become liable for the debts of the Rockaway Beach Company, is specifically referred to and relied on in the bill (Rec. foot of p. 3, p. 4) and the declaration in the suit in which the judgment was rendered (Rec. p. 11) counts on no liability whatever, except that arising out of the filing of the alleged false certificate by Attrill as a director. In fact, in his bill in this case, the Plaintiff in Error expressly avers, in words, (Rec. p. 6.) that "the lawful suits, damages, debts and demands against the said Attrill," which the transfer of the stock was intended, as is charged, unlawfully to hinder and delay, arose out of his (Huntington's) claim against Attrill, as a stockholder (not here in issue) and "out of the cause of action on which the judgment hereinbefore recited has been recovered." (Rec. p. 6.)

In this state of the pleadings and facts, it seems impossible to deny that the case of the Plaintiff in Error is founded and depends, directly and altogether, upon his original cause of action against Attrill, under the New York statutes, and that this Court not only can go, but is invited, as was the Court of Appeals, by the Plaintiff himself, to go behind his judgment, to that cause of action, and to decree, not on the judgment, but upon the equities arising out of the cause of action alone. It is, therefore, respectfully submitted, that the Federal question which might otherwise have been raised, under the Constitutional provision, in regard to the force and effect of the judgments of sister States, in their respective tribunals, was put out of the case, by the Plaintiff in Error himself, and by the very nature of his contention. The Court below was not called upon to determine the effect of the judgment, but the effect of the cause of action on which it was founded. It had nothing before it but the question, whether a liability for the debts of a corporation, imposed on one of its officers, by the statutes of New York, as a penalty for official default or misconduct, *ipso facto* created an equity in favor of the creditors of such corporation, in a sister State, in which such penalty would not be judicially recognized as a cause of action, much less enforced. In the leading case of the First National Bank of Plymouth *vs.* Price (33 Md., 487), cited with approval by this Court in Steam Engine *vs.* Hubbard, 106 U. S., 192, the Court of Appeals determined, twenty years ago, that the individual liability of the directors, in just such a case as the present, "is altogether statutory, imposed on them as wrong doers, and in its nature penal, and as such can only be enforced within the State where the Statute operates" (33 Md., 499). With this decision before it, and fortified not only by the many decisions to which the opinion in 33 Maryland refers, but by the authority of this Court, in Flash *vs.* Conn. (109 U. S., 376) and Wisconsin *vs.* The Pelican Insurance Company (*ubi supra*), the Court of Appeals could not do otherwise

than hold, apart altogether from any consideration of the Federal question alluded to, that the cause of action in New York, on which the Plaintiff in Error relied as the sole basis of the relief which he prayed, was not a cause of action, outside of New York, in any shape, directly or indirectly, and could no more be invoked to sustain a proceeding in equity in Maryland, under the Statute of Elizabeth, than to support a direct action to recover the New York penalty in a Maryland Court of common law. As the bill not only did not pretend that the judgment had made the cause of action anything but what it was in itself from the beginning, but insisted on the contrary, that it was only the identical original penal cause of action, put into the altered shape of a judgment, and was still the same thing whatever its shape, the decision of the Court of Appeals became, by the very form and force of the Plaintiff's own contention, altogether independent of the Federal question and the judgment, and is to be treated here as free from complication with them. The Defendant in Error therefore respectfully submits that the case is distinctly within the operation of the rule so clearly laid down in the recent case of Morrow *vs.* Brinkley (129 U. S., 178, 181), that "Unless it appears affirmatively that the decision of a Federal question was necessary to the determination of a cause, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it, the Supreme Court has no jurisdiction of a Writ of Error to a State Court."

The Federal Question.

But, assuming, for the purpose of the argument, that the Federal question already alluded to is in the case, as presented here, let us see how far it stands in the way of the motion now under argument. In other words—what is the real value of the contention, that a penalty, which cannot be directly enforced, outside of the State by

whose Statute it is imposed, becomes compulsorily enforceable, in every other State, by reason of its having been reduced to judgment in the home tribunals? Is a penalty any less a penalty, because it has taken the shape of a home judgment? Does a State, which has no power of its own to compel the Courts of another jurisdiction to enforce its penal enactments, acquire that power indirectly from the Constitution of the United States, by rendering judgments for the penalties, in its own Courts? Was the constitutional clause, which requires each State to give full faith and credit to the judicial proceedings of other States, intended to confer on the States, respectively, the right to force the execution of their punitive laws upon other States, by putting their penalties into the shape of judgments?

It is respectfully insisted, on behalf of the Defendant in Error, that these questions are sufficiently and very definitely answered, in the negative, in the case of Wisconsin against the Pelican Insurance Company already cited. In the Court below, however, the Plaintiff in Error endeavored to escape the effect of the rulings of this Court in that case, upon the ground that the judgment there was rendered in favor of the State of Wisconsin, and upon its own suit, for a pecuniary penalty for the violation of certain provisions of a Statute in reference to the mode of conducting the business of insurance; that the punishment there prescribed was for a public offense; that a pecuniary penalty, such as that imposed by the New York Statute, to be recovered by individuals, on their own suit, is not a punishment, and that a judgment, rendered for it, is accordingly enforceable in all jurisdictions.

The expressions in the opinion of this Court, on p. 299 of the printed Report, were relied upon by the Plaintiff in Error, and doubtless will be referred to in this Court, as indicating an intention to limit the scope of the judgment of the Court to cases, in which the action is brought, by the State itself, to recover a penalty in the nature of a fine. It is submitted that the language referred

to was plainly used only with reference to the facts of the particular case, and that the limitation sought to be engrafted upon the opinion and supposed to be recognized, by implication, is inconsistent with the whole current and scope of its reasoning. If the same penalty, prescribed by the Wisconsin Statute, had been made recoverable for the same misconduct, by any private policy holder, in his own name, instead of the Insurance Commissioner in the State's name, it is not easy to perceive that it could have made any difference in principle. It would still have been the same penalty or "forfeiture," prosecuted under the State's authority, for the same offence, and it could have made no possible difference to the company which had to "forfeit" the money, whether the State delegated the power to enforce the forfeiture to one person rather than another, or preferred to sue for itself. On this point see Missouri Pacific Railway Co. *vs.* Humes, 115 U. S., 512, hereinafter particularly referred to.

In the case of Flash *vs.* Conn, this Court had already held the liability under the 12th section of the New York Statute, which corresponds in all material respects with the 21st section before mentioned, to be for a penalty, and had ruled that suit for it could be maintained only in the New York Courts (109 U. S., pp. 376–8).

The same proposition had been also decided in 101 U. S., pp. 191–2, (Steam Engine *vs.* Hubbard), and it was only emphatically reiterated—not announced *de novo*—in the case of Wisconsin *vs.* Pelican Insurance Company. The question, however, arose in the latter case, whether the fact that judgment had been obtained for a penalty could alter its nature, or preclude inquiry into the cause of action, behind the judgment.

In the case of Boynton *vs.* Ball, 121 U. S., 466, it had been decided (as often held elsewhere) that the character of a debt was not changed by its merger into a judgment, and that the Court might look behind the judgment and ascertain upon what cause of action it was rendered.

The judgment on this point in the Wisconsin case then simply was, that the Constitution, article 4, section 1, and the Revised Statutes, section 905, established a rule of evidence merely (see, *ad idem*, the later case of Cole *vs.* Cunningham, 133 U. S., 107, 112); that they had no effect on the jurisdiction of the Court in which the record of a judgment might be offered (127 U. S., pp. 291–2), and did not interfere with the right of such Court to go behind the judgment. The decision of this Court, as well as the cases in 33rd Maryland and in New York (see Flash *vs.* Conn, 109 U. S., 377), having thus established the general proposition, that penal laws, including those conferring the right on creditors of the corporation to sue its officers for its debts, are not enforceable beyond the jurisdiction of their enactment, the further ruling, in the same case and connection, that the nature of the cause of action was open to enquiry as to whether or not it was a penalty, would seem necessarily to lead to the conclusion, that, if it should be found to be a penalty, it could not be enforced through the form of a judgment.

The argument for the distinction sought to be engrafted on the judgment in the Pelican Insurance Company's case, is founded upon the idea, that a penalty for which the State can sue is a punishment, while one for which creditors may sue is not to be regarded as such. This Court having decided, as we have just said, that alien Courts will not enforce any penalty, and that the rendition of a judgment for a penalty leaves its nature and incidents unchanged, the argument probably requires no answer. But it is founded upon a mistaken view of the nature of a penalty, and assumes that only "criminal laws," strictly speaking, are "penal." When a penalty is imposed for any violation of a public duty, such as that involved in the present litigation, it is a punishment, even if it is inflicted through the agency of a suit by creditors. The State of Maryland, in chartering the Baltimore and Ohio Railroad Company, required that it should be constructed through certain portions of Washington County, Maryland, and enacted, that if it were not so constructed,

the company should "forfeit" $1,000,000 to the State for the use of Washington County. In the case of the State, for the use of the county, against the Baltimore and Ohio Railroad Company, 3 Howard, 534, the question arose whether the State might repeal this provision. In the course of the judgment of the Court, Ch. Justice Taney said, that, "in legislative proceedings, a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law" (p. 552).

In the case of the United States *vs.* Lathrop, 17 Johns. Rep., p. 9, Chief Justice Spencer said that it could not "be doubted that a pecuniary penalty for a violation of, or non-conformity to an act * * * is as much a punishment for an offence against the laws, as if a corporal penalty had been inflicted." (And see Scoville *vs.* Canfield, 14 Johns., 338.)

In the case of Breitung *vs.* Lindauer, 37 Michigan, 217, suit was brought under a Statute of Michigan by a creditor of a corporation, to charge an officer for its debts, because he had failed to file a report required by law, the provisions of the section relied upon being the equivalents of the 21st section of the New York law involved in the present controversy. The Court consisted of Judge Cooley and three other judges. It was held that the liability of the officer was "imposed by the statute, for a violation of its provisions," and that it was intended as a punishment for a breach on the part of the officers of their clear statutory duty, and was wholly independent of any injury which creditors of the corporation may have sustained in consequence of such neglect."

In the case of Sturgis *vs.* Burton, 8 Ohio State, 221, it was held that, in a like statute as to banks, "the liability of the directors is provided for, as in penal statutes, to vindicate a violation of law."

In the case of Shaler *vs.* Bliss, 34 Barb., 309, and 49 Conn., 18–20, Mitchell *vs.* Hotchkiss, similar provisions conferring the right upon individuals to sue for penalties are treated as statutes creating punishments.

See also Story's Conflict of Laws, secs. 620, 621, 625 A; 26 Wisconsin, 617. But, after all, it seems difficult to regard the question as any longer open, after the language of the decision in Steam Engine *vs.* Hubbard, 101 U. S., 188, 192, where, after citing with approval the Maryland case hereinbefore referred to (33 Md., 499), and others *ad idem*, the Court explicitly adds: "Corresponding decisions have been made in other Courts, and to such an extent as to justify the remark that the rule is universal." Indeed there are no Courts in the Union, where the doctrine is more vigorously asserted than in those of New York.

If there could be any doubt as to what this Court regards as having been definitely settled, by all the cases, it would certainly be removed, by its express language on the "punishment" question, in the case of the Missouri Pacific Railway Company *vs.* Humes (115 U. S., 512). A Statute of Missouri required all railroads to maintain fences and cattle guards along their roads, and, in case of their failure to do so, made them liable to parties injured by reason thereof, in damages double the actual damage done. The right to impose the duty on the roads, and make them pay for the actual damage resulting from its neglect, was not denied. But it was argued, on behalf of the road, (p. 516) that "the power to inflict double damages therefor, and hand over to the injured party that which represents double the amount of his injury, is directly challenged, because depriving the corporation of its property without 'due process of law,' and denying to it 'the equal protection of the laws.'" The Court refused its sanction to this doctrine, and held that it made no difference that the additional damages were to be paid to the injured party and not to the State. The "additional damages," said Mr. Justice Field, who delivered the opinion, "being by way of punishment, it is clear that the amount may be thus fixed and it is not a valid objection that the sufferer, instead of the State, receives them. . . . The power of the State to impose

fines and penalties for a violation of its statutory requirements, is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion."

It is, therefore, respectfully submitted, that even if the Federal question suggested should be regarded as really in the case, it is a question so frequently, definitively and recently put at rest by this Court, as to preclude its being brought here again. In the very carefully considered case of the Anarchists (Spies *vs.* Illinois, 123 U. S., 131, 163, 164), the rule which the Court has prescribed for its own government, in dealing with motions like the present, is too clear and positive to be mistaken. "It is our duty," says the late Mr. Chief Justice Waite, speaking for the whole Court (pp. 163, 164), "to ascertain not only whether any question reviewable here was made and decided in the proper Court below, but whether it is of a character to justify us in bringing the judgment here for re-examination. In our opinion the writ ought not to be allowed by the Court, if it appears from the face of the record that the decision of the Federal question, which is complained of, was so plainly right as not to require argument, and especially if it is in accordance with our well-considered judgments in similar cases. This is in effect what was done in Twitchell *vs.* The Commonwealth, 7 Wallace, 322, where the writ was refused, because the questions presented by the record were no longer subjects of discussion here. Where under section 5 of our rule 6, a motion to affirm is united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm, when the question on which our jurisdiction depends, was so manifestly decided right that the case ought not to be held for further argument. Arrowsmith *vs.* Harmoning, 118 U. S., 194–195; Church *vs.* Kelsey, 121 U. S., 282." (And see Chanute City *vs.* Trader, 132 U. S., 210.)

There is another reason, to some extent already stated, why the suing out of the Writ of Error here is "frivolous" in the judicial sense of the word. Assuming the Court of Appeals to have decided the case upon the Federal question suggested, as a sufficient ground for its conclusions, it would seem to be very apparent, that the decision of that question was in nowise "necessary to the judgment which was rendered" (Adams *vs.* Burlington, &c., 112 U. S., 127). There is another sufficient and controlling ground, involving no Federal considerations, on which the same conclusion might and must have been reached, and the existence of which would ensure a dismissal of the Bill if the cause were remanded. The action at law in New York was not instituted until March, 1883, and judgment was not obtained until 1886. The present proceeding in Maryland was not instituted until 1888. The transfer of stock had been made in 1882, at the time when the Plaintiff in Error had no claim whatever against Attrill, except such as he could have made out under the New York Statute, unassisted down to that time by the judgment of any Court. In the language of the Court of Appeals of Maryland (33 Md., 488, 490, [illegible])

State *ex. rel.* Thomas *vs.* Youmans, 5 Indiana (Porter), 280. Action on the official bond of a sheriff for not executing a writ within the time therein mentioned. An act in force, when the suit was instituted, provided etc. if any officer shall neglect or etc. to return any writ on etc. the day therein etc. he shall be amerced to the amount with interest and costs due on such writ. This act was repealed *pendente lite.* The Court said: "It is true if a party, under a prior statute, has acquired a vested interest, its subsequent repeal would not affect his rights; but that principle is not applicable to the case at bar, because *in a penalty there can be no vested right until it has been reduced to a judgment. A mere penalty never vests, but remains executory.*"

The Dissenting Opinion Below.

Although, by the Constitution of Maryland, (Art. 4, Sec. 15), the Court of Appeals is required to file an opinion in writing in every case, there is no provision making dissenting opinions part of the record. The opinion of Judge Stone, united in by Judge. McSherry and differing from that of the Court, has nevertheless been made part of the Transcript here, (p. 26), and as it not only is entitled to due consideration, in itself, but embodies the reasoning on which the Plaintiff in Error most seriously relied, below, the attention of this Court is respectfully called to it. The point of the contention, as already shown, is, that in the Wisconsin case, (127 U. S., *ubi supra*), this Court meant to confine its ruling, in respect to pecuniary penalties, to cases where the State itself sues directly, or to judgments rendered "in favor of the State" on its own direct suit. It was insisted below that the language used by Mr. Justice Gray, in the Court's opinion, (127 U. S., 290-299), was employed especially for the purpose of drawing a distinction between penalties recoverable through the suit or prosecution of the State itself, and those made recoverable by private individuals, suing in their own names, and of excluding the latter class from the scope of the Court's decision. This argument was not only sought to be supported by an examination of the opinion itself, which has already been considered, but by an endeavor to show that this Court in previous cases, had, practically, though tacitly, adopted and enforced the doctrine contended for, by recognizing the jurisdiction of the Circuit Court in such cases, and exercising its own jurisdiction in disposing of them on the merits. It is to this aspect of the case that the dissenting opinion substantially directs itself. The cases indicated are Steam Engine Co., *vs.* Hubbard, 101 U. S.; Chase *vs.* Curtis, 113 U. S., 452, already referred to. The doctrine asserted in regard to them is, that as to State Statutes, the Courts

of the United States are "Courts of another country," and as this Court recognized the jurisdiction of the Circuit Courts to determine those cases, and exercised jurisdiction, itself, in reviewing and deciding them, it follows that this Court did not regard the penalties in those cases as belonging to the penal provisions, which "the Courts of another country" will not recognize or execute.

At first blush, it seems a little bold to contend, that in two cases where this Court, deliberately and expressly decided, in the most forcible language, that Statutory provisions like that in controversy here are "penal," and "can only be enforced in the State where the Statute was passed," (101 U. S., 102), and again, "that they are "penal in their character," and are "for the enforcement of a penalty and subject to all the rules applicable to actions upon Statutes of that description," (113 U. S., 457-458), the very exercise of jurisdiction by this Court, to decide these propositions, implied that the propositions so decided were not law. That this is a perfectly fair statement of the argument under consideration is made apparent by the brief of the Plaintiff in Error, filed in the Court below, in which the point is stated thus: "As regards State Statutes, the United States Courts are Courts of another country. It is not a question of territorial boundary. The United States Supreme Court sits in the State of Wisconsin as in all the States of the Union. If the New York Statute be a penal law, within Chief Justice Marshall's maxim, so is the Statute of Connecticut, and neither the U. S. Circuit Court nor the Supreme Court had any jurisdiction in the Steam Engine Co. *vs.* Hubbard, (101 U. S., 88). There was the same lack of jurisdiction in Chase *vs.* Curtis, (113 U. S., 452)."

Nevertheless this Court did entertain jurisdiction of those cases, and did decide that the statutes in each of them, like the New York statute, were penal laws, and did insist that they were within Chief Justice Marshall's maxim in the Antelope case. We venture to

believe therefore that the Court did not mean to assume the position of impliedly overruling what, in the same breath, it expressly decided.

It is submitted (with great respect) that the dissenting opinion does not disclose, as clearly as it might, either the precise point meant to be raised by it, or the process by which its conclusions are reached. It is chiefly directed towards establishing the proposition that the statutory provision, in dispute here, is not a penal provision, and endeavors to show this from rulings in the Federal Courts, which the learned judge regards as differing from those of the State Courts. This line of argument is adopted by the judge, because, as he says, at the close of his opinion (Rec., p. 29), he thinks the question a Federal one. In this it is believed that his mistake is too manifest to require discussion. The only Federal question indicated in the case, is as to the effect of the judgment. Whether the statute is, or is not penal, was altogether for the Maryland Court to decide, as a question of general and not constitutional law, and strange to say, the learned judge admits that the Maryland Court did decide it in Price's case (33 Md., *ubi supra*), and that the decision was right, and is of course the law of Maryland.

Moreover, the dissenting opinion is further in error, in stating that in Chase *vs.* Curtis, the action was brought in the U. S. Circuit Court, "upon a judgment recovered by the creditor of a corporation, against the trustees of the corporation." A reference to the case will show that the action was brought in the Circuit Court for the Southern District of New York, by a citizen of Pennsylvania, against New York defendants, on judgments *in tort*, rendered in Pennsylvania *against the corporation*, not the trustees, and that the law of New York, making the trustees liable, was only invoked in New York, against the citizens of that State. This Court not only held in express terms (113 U. S., 460) that the Circuit Courts would entertain suits founded on State statutes, but

considered the rules of evidence by which they would be governed in such cases. In the case in 101 U. S., 188, the Steam Engine Company, apparently a Rhode Island corporation, being a creditor of a Connecticut corporation, sued Hubbard, the president of the latter, for a debt due by it. The action was brought in the Circuit Court, for the District of Connecticut, under a statutory enactment of that State, similar to that which is here in controversy, and the Court entertained the jurisdiction as a matter of course, though it held the statute to be penal.

In both cases it will be seen that suit was brought in the Circuit Court for the State by which the statute was enacted, and, in each case, the Court acted as a Court of the particular State would have acted in the premises, and exercised jurisdiction because such State Court would have entertained it. In the Wisconsin case, on precisely the same principle, this Court refused to entertain jurisdiction because outside of Wisconsin the penal provision was not enforceable. So far from these rulings being inconsistent, much less contradictory, the later decision is, in principle, but the consequence and complement of the others. It did not occur to the Court that a penalty collectable by a private citizen for an official corporate default, and only enforceable by an ordinary action of debt, was not such a suit as a Circuit Court might hear, in a cause otherwise within its jurisdiction, because a suit, by a State, to collect a fine or forfeiture, for "an offence committed against the State by violating her law" (127 U. S., 299), was not a "controversy of a civil nature, where a State is a party," within the operation of the constitutional provision which gives the Supreme Court original jurisdiction in such cases. The doctrine that a Court of the United States is "a Court of another country," does not seem to have suggested itself as applicable to a Circuit Court of the United States, expressly organized as a Court of resort for citizens of States, who desire to have the law of other States administered in their behalf by tribunals independent of local influences.

If anything can be assumed to be rudimental, in connection with the functions of the Circuit Courts, it is their jurisdiction and duty, not only under the special provisions of Section 721 of the Revised Statutes, but upon the general principles of the Federal Judiciary Acts, to give to their proper suitors, under such statutes of the States in which they sit, as are not in conflict with the Federal Constitution or any Act of Congress, the same relief that would be granted upon suit in the State tribunals. "This principle," says the Court in *ex parte* McNiel (13 Wallace, 237), "may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a Federal tribunal" (Acc. Reynolds *vs.* Crawfordsville Bank, 112 U. S., 410); Dennick *vs.* R. R. Co. (103 U. S., 11); Smith *vs.* R. R. Co. (99 U. S., 398–401). In fact, says this Court, as far back as Green *vs.* Neal's lessee (6 Peters, 291), "in a great majority of the causes brought before the Federal tribunals, they are called to administer the laws of the State. The rights of parties are determined under those laws." The whole subject has been so thoroughly discussed on the Circuit, by some of the ablest judges, that no illustration is wanting to the doctrine thus authoritatively established. See Neal *vs.* Beale, Taney's Decisions, 339–360; Lorman *vs.* Clarke, 2 McLean, 568; Holmes *vs.* Railway, 5 Fed. Rep., 75; Whitehead *vs.* Entwhistle, 27 Fed. Rep., 778–780; Buford *vs.* Holley, 28 Fed. Rep., 680.

S. T. WALLIS,
WILLIAM A. FISHER,
for Defendant in Error.

If anything can be assumed to be rudimental, in connection with the functions of the Circuit Courts, it is their jurisdiction and duty, not only under the special provisions of Section 721 of the Revised Statutes, but upon the general principles of the Federal Judiciary Acts, to give to their proper suitors, under such statutes of the States in which they sit, as are not in conflict with the Federal Constitution or any Act of Congress, the same relief that would be granted upon suit in the State tribunals. "This principle," says the Court in *ex parte* McNiel (13 Wallace, 237), "may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a Federal tribunal" (Acc. Reynolds *vs.* Crawfordsville Bank, 112 U. S., 410); Dennick *vs.* R. R. Co. (103 U. S., 11); Smith *vs.* R. R. Co. (99 U. S., 398–401). In fact, says this Court, as far back as Green *vs.* Neal's lessee (6 Peters, 291), "in a great majority of the causes brought before the Federal tribunals, they are called to administer the laws of the State. The rights of parties are determined under those laws." The whole subject has been so thoroughly discussed on the Circuit, by some of the ablest judges, that no illustration is wanting to the doctrine thus authoritatively established. See Neal *vs.* Beale, Taney's Decisions, 339–360; Lorman *vs.* Clarke, 2 McLean, 568; Holmes *vs.* Railway, 5 Fed. Rep., 75; Whitehead *vs.* Entwhistle, 27 Fed. Rep., 778–780; Buford *vs.* Holley, 28 Fed. Rep., 680.

S. T. WALLIS,
WILLIAM A. FISHER,
for Defendant in Error.

146 U.S. 657

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889. No. 1100.

COLLIS P. HUNTINGTON,

PLAINTIFF IN ERROR,

vs.

ELIZABETH C. ATTRILL.

Brief on part of Plaintiff in Error on Defendant's Motion to Dismiss Writ of Error.

JOHN K. COWEN,
E. J. D. CROSS,
HUGH L. BOND, JR.,

For Plaintiff in Error.

COLLIS P. HUNTINGTON,

Plaintiff in Error,

vs.

ELIZABETH C. ATTRILL.

IN THE

Supreme Court

OF THE

UNITED STATES.

October Term, 1889.

No. 1100.

In Error to the Court of Appeals of Maryland.

Brief for Plaintiff in Error, on Motion to Dismiss or Affirm.

STATEMENT OF THE CASE.

On the 15th day of June, 1886, in the Supreme Court of the State of New York, Collis P. Huntington recovered a judgment for $100,272 against Henry Y. Attrill and another. On that judgment he subsequently instituted the present suit in equity in the Circuit Court of Baltimore City, Md., to set aside certain transfers of stock in the Equitable Gas Light Company of Baltimore City, made by said Attrill to himself as trustee of Helen F. Attrill, his wife, and of his two daughters, on the ground that the transfers were without consideration and void as in fraud of Attrill's creditors.

The Maryland Statute provides that "in no case of a proceeding in equity to vacate any conveyance or contract, or other act, as fraudulent against creditors, shall it be necessary for any creditor or plaintiff in the cause to have obtained a judgment at law on his demand, in order to the relief

sought in the case, either in his own behalf or in behalf of any other creditors who shall claim to participate in the benefit of the decree in the case," and then provides for issues out of Chancery for determining the indebtedness, if disputed. Md. Code Pub. Gen. Laws, Art. 16, Sec. 46.

The amended bill (Record pp. 1-7) sets out:

The incorporation, February 29, 1880, of the Rockaway Beach Improvement Company (limited); its purposes and the amount of its capital stock, and that Henry Y. Attrill was an incorporator and a director from February 26, 1880, to July 29, 1881. (Record, pages 1 and 2).

It then sets forth the recovery of the judgment by the plaintiff against said Attrill, in the Supreme Court of New York, June 15, 1886, which judgment is still in full force and virtue, and has never been paid, satisfied or secured, and proceeds to state the nature of the cause of action on which that judgment was recovered, and how and when it arose, showing that the plaintiff's cause of action against Attrill accrued by reason of the signing of a false report by the latter as a director, June 30, 1880, whereby said Attrill became under the New York statute, directly and individually liable to the plaintiff for a debt contracted by the corporation June 15, 1880. (Record, pages 2 and 3).

The bill further alleges that the corporation was declared insolvent and dissolved March 8, 1882, in a proceeding by the State of New York; that at the time of its dissolution, the corporation was indebted to the plaintiff and others to an amount far in excess of its assets; and that Attrill was, at that time, and at the date of the transfers of stock hereafter mentioned, liable as a stockholder for the debts of the corporation to the aggregate amount of $340,000, and was also at both said times liable as a director for debts of the corporation to an amount in excess of the whole value of his property. (Record, page 3).

It is further alleged that Attrill was, in March, 1882, and and has ever since, remained indebted individually to a large amount, in addition to his obligation as a director and as a stockholder in the said defunct corporation, and that he is insolvent and has secreted and concealed all his prop-

erty for the purpose of defrauding his creditors. Execution was issued on the plaintiff's judgment in New York and returned unsatisfied, there being no property on which to levy. (Record, page 4).

In the month of April, 1882, Attrill received a large amount of stock in the Equitable Gaslight Company of Baltimore City, a corporation incorporated by the Act of Maryland of 1867, chapter 132, and immediately, on the 14th of April, 1882, transferred 1,750 shares of said stock to himself as trustee for his wife and children respectively. At the time of these transfers both the plaintiff and Attrill were domiciled and resident in New York; and the transfers themselves were made in New York, where the principal and transfer office of the company was located and its books kept; where its officers resided, and where all its stock was transferable and transferred. (Record, pp. 5 and 6).

The bill charges that these transfers were made without valuable consideration, and with the specific intent to "delay, hinder and defraud Attrill's creditors, and especially with the intent to delay, hinder and defraud the plaintiff of his lawful suits, actions, debts and demands, arising out of the plaintiff's said claim against Attrill as a stockholder of said Rockaway Beach Improvement Company, Limited, and out of the cause of action on which the judgment hereinbefore recited was recovered; and that said transfers were, by the laws of the State of New York, as well as by those of the State of Maryland, fraudulent and void as against the creditors of the said Attrill, including the creditors of the said Rockaway Beach Improvement Company, Limited, and were and are fraudulent and void against this plaintiff."

The substance of the relief prayed for is "that the said 1,750 shares of the capital stock of said corporation may be decreed to be subject to the claim of this plaintiff on the judgment aforesaid, and the same may be ordered to be sold," etc.

This, then, is a suit brought by the holder of a judgment debt to set aside transfers made by the judgment debtor

prior to the recovery of the judgment and to the bringing of the suit in which the judgment was recovered.

The plaintiff claims the right to have the transfers of stock set aside.

First. On the ground that, at the time of the transfers, he had a just and lawful action, suit, debt or demand against Attrill, and that the transfers were made with the intend to hinder, delay and defraud him thereof; and

Second. On the ground that he is a creditor holding a debt of record; that the transfers were fraudulent in fact, having been made with the specific intent and purpose to defraud all Attrill's creditors at that time, viz: creditors to whom he was and still is indebted on his individual account; creditors to whom he was indebted to the amount of $340,000 as a stockholder in the Rockaway Beach Company, and creditors to whom he was indebted as a director in said company; and that, therefore, the plaintiff is entitled to have the transfers set aside without regard to the time when he became a creditor of Attrill.

With the amended bill, and as part thereof, was filed the exemplified copy of the judgment and proceedings of the Supreme Court of the State of New York, duly certified under the act of Congress of 1790. (Record, pp. 10–20.)

The defendant, Elizabeth C. Attrill, filed a demurrer to the bill, alleging for cause of demurrer (Record, p. 8):

"1. That the bill shows that the claim of the plaintiff is for the recovery of a penalty against the defendant, Henry Y. Attrill, arising under a statute of the State of New York.

"2. Because the amended bill does not state a case which entitles him to any relief in a court of equity in this State."

This demurrer was overruled by the Circuit Court; but on appeal, the Court of Appeals of the State of Maryland reversed the order of the Circuit Court and dismissed the bill (Record, p. 21). To review that judgment the present writ of error has been sued out (Record, p. 29), on the ground that the plaintiff in error claims a right and privilege, under the Constitution and statutes of the United

States, and the decision of the Maryland Court of Appeals is against the right and privilege so set up and claimed by him, and that in said suit there is drawn in question the validity of a statute of and authority exercised under the United States, and the decision is against the validity of such statute and of such authority.

ARGUMENT.

1.—*The Federal Question is Clearly Raised.*

The Act of Congress, passed in pursuance of section 1 of Article 4 of the Constitution, provides that the records and judicial proceedings of each State court, where properly authenticated, "shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from whence said records are or shall be taken."

The plaintiff in error brings suit in the proper court of Maryland, on a judgment of the Supreme Court of New York, which is admitted to be the judgment of a court having jurisdiction of the parties, in full force and virtue in New York, and never paid, satisfied or secured.

Thereupon the Court of Appeals of Maryland dismisses the suit, on the ground that the judgment of the New York court does not constitute a cause of action in a Maryland court. If there could ever have been a doubt that the decision of the Maryland Court of Appeals denies the plaintiff-in-error a right and privilege secured to him by the Constitution and statutes of the United States, the doubt has been removed by the decision of this court in Christmas vs. Russell, 5 Wall., 290. In that case the Legislature of Mississippi had enacted that no action should be maintained in the Mississippi courts on a judgment recovered against a citizen of Mississippi in the court of another State, when the cause of action on which such judgment was recovered had been barred by the Mississippi Statute of Limitations at the time suit was brought in such other State. *Held*, that to refuse to sustain a suit on a judgment recovered in Kentucky on such a cause of action, was to

deny it the "effect" required by the Act of Congress, and that the Mississippi statute was unconstitutional and void.

2.—*The Federal Question is the only one on which the Court below did or could base its Judgment.*

By reference to the opinion of the court (Record, pp. 21–25), it will be seen that the majority of the Court of Appeals deal simply and solely with the question whether the New York judgment constitutes a cause of action in any Maryland court. The decision would be as applicable to an action of debt on the judgment as to the present suit in equity.

The conclusion of the majority of the judges is epitomized in the concluding sentence of the opinion, thus: "Upon the whole it appears to us that the complainant has no cause of action which he can maintain in this State."

Two of the ablest members of the court dissented upon the express ground that the question was a Federal one, and its decision must be governed by the decisions of this Court, rather than by those of the State courts. (Record, p. 26.)

It appears, affirmatively, therefore, that the Federal question was actually decided by the court below, and that the decision of that question, dissociated from the character of the present action and the relief sought therein, determined the judgment of the court. Having decided that the plaintiff was not a creditor of Attrill at all, the court did not even touch the remaining points, viz: Whether the validity of the transfers of stock in question was to be governed by the law of New York, where they were made, or by the law of Maryland; whether the plaintiff could claim as a contemporaneous creditor, and whether he could claim as a subsequent creditor. These questions arise from the character of the proceedings and the relief prayed.

The court below decided that in no proceeding and for no form of relief could the plaintiff in error obtain the aid of a Maryland court.

3.—*Is the present case within the Decision of this Court in Wisconsin vs. The Pelican Insurance Company,* 127 *U. S.*, 265?

The case of Wisconsin vs. The Pelican Insurance Company was a suit brought originally in this court by the State of Wisconsin on a judgment recovered in its own courts against the Insurance Company, a corporation of Louisiana, for penalties imposed by a statute of Wisconsin upon foreign insurance companies failing to make returns to the Insurance Commissioner of the State. The main question was whether such an action was within the original jurisdiction of this court. The decisions holds:

(1) That the original jurisdiction of this court in cases to which a State is a party, extends only to controversies of a *civil nature.*

(2) The suit of the State of Wisconsin is not a suit of a civil nature, and the fact that the suit is brought on the judgment recovered by Wisconsin in her own court, does not alter its character as a suit of a penal (in the sense of criminal) nature.

(3) The provisions of the Constitution and of the act of Congress by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States, as they have by law or usage in the State where they were rendered, do not operate to give the Supreme Court original jurisdiction of a suit on a judgment of a criminal nature.

Mr. Justice Gray, delivering the opinion of the Court, says, page 289:

"The grant" (U. S. Const., Art. 3, Sec. 2) "is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all. By the law of England and of the United States the penal laws of a country do not reach beyond its own terriory, except

when extended by express treaty or statute to offenses committed abroad by its own citizens, and they must be administered in its own courts only, and cannot be enforced by the courts of another country. Chief Justice Marshall stated the rule in the most condensed form as an incontrovertible maxim, 'The courts of no country execute the penal laws of another.'"

The whole question in the present case turns upon the definition and scope of the rule stated by Chief Justice Marshall.

Does the plaintiff in error ask the Maryland court to execute the "penal laws" of New York within the meaning of that rule?

The definition of the rule by this court in Wisconsin vs. Pelican Ins. Co. does not include the present suit. Mr. Justice Gray, at page 290 of the opinion, says: "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits *in favor of the State*, for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

Again at page 299 he says: "The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute imposing a penalty upon any insurance company of another State doing business in the State of Wisconsin without having deposited with the proper officers of the State a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offense committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State, and be paid, one-half into her treasury and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. The real nature of the case is not affected by the forms provided by

the law of the State for the punishment of the offense. It is immaterial whether by the law of Wisconsin the prosecution must be by indictment or by action, or whether under that law a judgment there obtained for the penalty might be enforced by execution by *scire facias*, or by a new suit. In whatever form the State pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense."

In Dennick vs. Railroad Company, 103 U. S., 11, Mr. Justice Miller delivering the opinion, (page 17) says of the "death statute" of New Jersey: "It can scarcely be contended that the act belongs to the class of *criminal* laws which can only be enforced by the courts of the State where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury."

The argument for the defendant-in-error is simply a play on the word "penal." The learned counsel state the maxim "the courts of no country execute the penal laws of another." They then cite cases which lay down the rule that no action can be maintained in another State on the New York statute or one similar (e. g. Flash vs. Conn, 109 U. S., 371), cases which involve the rule of construction to be applied to such statutes, and which hold that they are to be strictly construed (*e. g.* Steam Engine Co. vs. Hubbard, 101 U. S., 188; Chase vs. Curtis, 113 U. S., 452,) and cases which hold that the repeal of such a statute, without saving actions pending thereunder, abates such actions (e. g. Union Iron Co. vs. Pierce, 4 Bissell, 327). In these cases the statutes in question are characterized by the word "penal." The citations are supposed to demonstrate that statutes such as the New York Corporation Law are "penal laws," within the meaning of the maxim of international law. We contend that before such a conclusion follows, it is necessary to show further that the word "penal," as used in the cases cited, is used in exactly the same sense as in

the maxim. Every one knows that the word "penalty" has many meanings, or shades of meaning, in legal phraseology. The word "penal" has equally varied shades of meaning. Mr. Morawetz, referring to the very decisions on which the argument for the defendant-in-error is based, says:

"It is not always quite clear what the courts mean to express by saying that statutes of this character are 'penal,' and that they impose upon the directors a 'penal liability.'

"The liability of the directors under such a statute is undoubtedly not the result of a contract between the directors and the creditors of the corporation; but that is evidently not what the courts mean to express. The liability of directors to creditors for a tort, or a misapplication of corporate funds, or breach of trust, does not arise out of contract; yet the courts would certainly not call this a penal liability, or refuse to enforce it because it arose under the laws of a foreign State.

"Nor is the liabilily of the directors under these statutes penal in the sense in which the word 'penal' is used in criminal law; it is not a penalty or fine imposed by the State for the infraction of a public law.

"The liability of the directors is both in form and in substance a private obligation, similar in many respects to that of sureties. It is imposed by the Legislature, partly for the purpose of inducing the directors to do their prescribed duties, and partly for the purpose of securing the company's creditors from losses caused by the acts of those who have control over the company's fortunes. The statutes imposing this liability establish a new rule of private right—a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called penal appears to be that it does not exist at common law, and is neither created by contract nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company."

2 Morawetz on Corporations, sec. 908 *et seq.*

The author then cites at length the opinion of the Supreme Court of Georgia in the case of Neal vs. Biggs, 12 Ga., 104, 111–113.

The cases on which our opponents rely in great part, involved the question whether such a statutory obligation as that imposed by the New York Corporation law could be sued on directly in the courts of another State. To make clear the scope of those decisions and the meaning of the word "penal" as therein used to characterize such statutes, it is necessary to sketch briefly the history of the law of remedies as applicable to causes of action arising outside the realm.

The courts of England maintain a suit on a contract wherever made, and enforce it agreeably to the law which the parties intended should govern it, provided that in so doing no rule of public policy or good morals be violated. The foreign law is regarded, not because it has any force in England as a command of a sovereign, but because the questions of contract or no contract, and of the meaning and effect of the contract, can be decided only by reference to that law. So it is that liabilities *ex contractu* are enforced in the courts of England and the United States to-day.

Under the early common law, by reason of the rules as to *venue*, no action either in contract or tort lay in an English court on matters happening outside the realm. Only after the invention of the legal fiction by which a false *venue* was alleged, and no traverse of the allegation allowed, could such an action be maintained.

Stephen on Pleading, 280–281.

Then was drawn the distinction between local and transitory actions, the former being defined as actions in which all the principal facts are local; the latter as actions in which any principal fact is transitory.

Stephen, *supra.*

Livingston vs. Jefferson, 1 Brock. 203.

Under the fictitious *venue*, any liability *ex delicto* of a transitory nature, arising from acts in a foreign country,

could be sued on in English courts, provided the acts constituted a *tort* at common law.

McKenna vs. Fisk, 1 How. 241, 248.

The allegation of fictitious *venue* went out of use, but the courts retained their jurisdiction of wrongs committed abroad, by virtue of a *presumption* that the common law was in force universally.

Allen vs. R. R. Co. 45 Md. 41.

That presumption may now be rebutted to the extent of proving authority for the act under the foreign law, so that the English courts refuse to-day to sustain an action for wrongs committed in a foreign country, (1) if the cause of action be *local* by the law of England; (2) if the wrong would not have been actionable had it been committed in England; and (3) if though actionable by English law, it is justifiable by the laws of the place where committed.

Phillips vs. Eyre, L. R. 6 Q. B. 128, 129.

When the States of the United States received as their heritage the common law of the mother country, they received as a part thereof the principle that wrongs committed abroad which would support a transitory action in tort at common law could be sued on in their Courts, by virtue of the presumption that the common law was the law of the foreign country also.

Equally did they receive the principle that no other wrongs committed abroad could be sued on in their courts, because the presumption extended to none other.

The effect of the distinction whose origin we have outlined, is to exclude from the courts of other States all causes of action *ex delicto*, created by the statutory law of the State as distinguished from the common law, and conversely acts, not actionable at common law, committed in another State, will not be actionable, although by the statute law of the *forum* they would be actionable if committed therein. The distinction is between statutory liabilities not *ex contractu*, and common law liabilities not *ex contractu*.

For instance, compare Mitchell vs. Harmony, 13 How. 115, in which jurisdiction was assumed of a tort to goods in Mexico, with Le Forest vs. Tolman, 117 Mass., 109, in which the court refused to sustain an action under the Massachusetts statute for double damages against the Massachusetts owner of a dog that had bitten plaintiff in New Hampshire. If in the latter case the plaintiff had alleged that defendant knew his dog was accustomed to attack and bite mankind, so as to make out a cause of action at common law, the Massachusetts court must have sustained the action. The present tendency is to extend the rule to agree with that of the Civil Law which grants an action in all cases when the *lex fori* and the *lex loci delicti* concur in holding that the act complained of is actionable, whether that law be statutory or common law.

Dennick vs. R. R. Co., 103 U. S., 11.
Boyce vs. Wabash Railway Co., 63 Iowa, 70.

The history of our law with reference to remedies for acts committed abroad, shows that the rule which denies a remedy for acts made actionable only by statute in the State where committed, or in the State of the suit, or in both, is a rule arising out of the history of the law of remedies, that it applies to all *statutory delicts*, and that it is an entirely separate and distinct rule from that by which the courts of one country refuse to punish criminally acts committed in another. Acts committed abroad will not be punished *criminally*, whether they be crimes at common law or not.

In the earlier cases in this country the distinction was not drawn between the stockholder's liability, under a statute for debts of the company to an amount equal to his stock, or that of the stockholders jointly and severally for all debts, until full payment of stock (which have since been held enforceable in another State, because arising *ex contractu*) and the liability of stockholders or directors, arising by reason of a failure in the performance of a duty imposed by statute. The liability of the stockholders, whether to the amount of their respective stock only, or jointly and

severally for all the debts until full payment of the capital stock, &c., was distinguished from the liability of the original contractors, and described as a "limited statute liability."

Erickson vs. Nesmith, 4 Allen, 233.
Andrews vs. Callender, 13 Pick. 490.
Halsey vs. McLean, 12 Allen, 442, 443.

In Halsey vs. McLean it was sought to hold the defendant for a debt of the corporation, both as stockholder and director, under the tenth or eighteenth and twelfth sections respectively of the New York statute. The court say (page 441): "An examination of the statute provisions relied upon by the plaintiff clearly shows that they do not leave the officers or stockholders in all cases personally liable for payment of the corporate debts. If they did, we should need carefully to consider whether under such a charter the members of the company do or do not remain in the condition of co-partners at common law. Even in that case it has been doubted whether the courts of another State could give effect to such a remedial provision. Drinkwater vs. Portland Marine Railway, 18 Maine, 37."

These earlier Massachusetts cases adopt the broad ground that the statute system of another State, in reference to the liability of stockholders and directors of foreign corporations, will not be enforced in that State. So held also in Erickson vs. Nesmith, 46 N. H., 371, 378. They analyze the liability of stockholders and directors only to ascertain whether the corporation is primarily liable, or the members are liable as co-partners. The courts of New York, on the other hand, made the distinction between the liability arising *ex contractu* and that arising *ex delicto;* and this distinction has become generally recognized. Flash vs. Conn, 109 U. S., 371, where the New York cases are cited. It is in making this distinction that the courts have characterized as a penalty the statutory liability, incurred by failure to perform some act, and have spoken of the statutory provision as "penal."

The words "penal" and "penalty" in these cases are used to express two distinct qualities. Sometimes the words

are employed to indicate that the obligation sought to be enforced is not an obligation *ex contractu;* sometimes to indicate that the obligation is not a common law obligation *ex delicto*, enforceable as such wherever it may have arisen, and sometimes the words are used to express both characteristics at once. We admit that in the class of cases which hold that such statutory obligations *ex delicto* can not be sued on directly in another State, the courts have confused the rule, arising from the law of remedies, that wrongs committed abroad are not actionable unless actionable at common law, with the rules of international law that "the courts of no country execute the penal laws of another." The decision of the case before the court did not require the making of the distinction. No matter which rule were applicable, the decision must be the same; and so this court cites cases under both rules in support of its decision, and uses the terms of both rules indifferently. This confusion has occurred almost as often in cases arising on the "death statutes," so called, of other States, as in those arising on corporation laws. Wharton Confl. of Laws, Sec. 480; Richardson vs. Railroad Company, 98 Mass., 85. Even this court fell into such an inadvertence—only *obiter*, however—in Flash vs. Conn, *supra.*

That the provision of the New York Corporation Law in question is not a "penal law" within the meaning of the maxim. "The courts of no country execute the penal laws of another," and that this court in characterizing the provision as penal did not use the term in the sense in which the maxim uses it, are propositions established by the action of this court and the U. S. Circuit Courts, in cases arising on the New York law and similar statutes of other States.

As regards the *penal* laws of a State (in the sense of the maxim), the Federal Courts sitting in that State are courts of a foreign sovereign. They have no power to administer the criminal laws of the State. The State can therein maintain no action for a penalty; no *qui tam* action, which is a common form of criminal suit, could be brought on the statute of the State.

Wisconsin vs. Pelican Ins. Co., 127 U. S., 265.

The considerations which enable a State court, if it chooses, to entertain a suit by the United States for a penalty imposed by Act of Congress, do not apply to a Circuit Court of the U. S. with reference to a State statute.

Claflin vs. Houseman, 93 U. S., 133.

If, therefore, the Statute of New York be *penal*, within the letter and spirit of the rule that the courts of one sovereign will not execute the *penal* laws of another sovereign, then no action could be maintained in the Federal Courts sitting in New York. But such actions have been entertained by the Federal Courts again and again, and that too with the concurrence of this Court.

Steam Engine Co. vs. Hubbard, 101 U. S., 188.
Chase vs. Curtis, 113 U. S., 452.
Union Iron Co. vs. Pierce, 4 Bissell, 327.

Steam Engine Co. vs. Hubbard came up on writ of error to the Circuit Court of the U. S. for the District of Connecticut. The suit was originally brought in the Circuit Court by the Providence Steam Engine Co., as a creditor of the Odorless Rubber Co., a joint stock company organized under the laws of Connecticut, to recover from Charles Hubbard, the president of the latter company, the amount of a debt due by it to the plaintiff company. The suit was based on a provision of the statute of Connecticut, which makes the president and secretary of a joint stock company, who intentionally neglect or refuse to file the certificate therein required, showing the company's condition, &c., jointly and severally liable for all the debts of the company contracted during the period of such neglect or refusal.

Conn. Rev. Stat., sec. 404, page 172.

Held (1) That the statute is penal, and must be strictly construed. (2) The defendant is not liable, if the debt was contracted by the corporation before, although it may remain unpaid during the period when he neglected or refused to comply with the requirements of the statute.

Chase vs. Curtis, was originally brought in the U. S. Circuit Court for the Southern District of New York. The plaintiff was the holder of a judgment against the Union Petroleum Co., of New York, recovered in the U. S. Circuit Court, Western District of Pennsylvania, in an action of trespass on the case for entering upon and taking oils from the plaintiff's lands. The defendants were trustees of the Union Petroleum Co., which was a corporation organized under the New York "Manufacturing Corporation" Law of February 17, 1848, as amended June 7, 1875. The suit was founded on section 12 of the Act, which makes the trustees liable for all the *debts* of the corporation on failure to file the reports of capital and of debts required by that section. It was *held* (1) that the provision of the statute was penal, and to be strictly construed; and (2) that a judgment for a tort was not a debt within the statute.

The Circuit Courts of the United States have jurisdiction of suits in which there is a controversy between citizens of different States only when such suits are *of a civil nature*. The jurisdiction of the Supreme Court in error to the Circuit Courts rests on exactly the same provisions of the Constitution passed on in Wisconsin vs. Pelican Ins. Co., *supra*. Although the attention of the courts below and on appeal was particularly called to the character of the respective statutes in the cases last cited, yet jurisdiction was unhesitatingly assumed in both cases by both courts, and the cases disposed of on the merits—and this in view of the well-known rule of the Supreme Court that the question of jurisdiction will be first decided, and where that is found wanting, no opinion will be expressed on any other point.

The U. S. Circuit Court for the District of Connecticut would not entertain a suit directly on the New York law, nor would a Federal Court in New York entertain a suit on the Connecticut statute. Why? The counsel for the defendant in error answer: "Because the respective statutes are penal, and will not be enforced by the Courts of another sovereign." Not so; for if that were the reason, the Federal Court in New York could entertain a suit

neither on the New York statute nor on that of Connecticut, and the Federal Court in Connecticut could entertain none. With respect to criminal statutes of both States, each court is that of a foreign sovereign. The true reason is that the right to be enforced is a statutory one of *a civil nature*, but unknown to the common law. The Federal Court sitting in the State which enacted the statute will entertain a suit to enforce the right, under the rule laid down in Railway Co. vs. Whitton, 13 Wall., 285. The Federal Court sitting in another State will not enforce the right by suit, because it is a right conferred only by the statute. The statute has of itself no extra-territorial force, and the statutory right does not come within the rule of comity for the reasons we have stated growing out of the history of the law of remedies.

The majority opinion below attempts to distinguish the statutory provision in question here, as a penal law, as follows: "The twenty-first section of the statute is in these words: 'If any certificate or report made or public notice given by the officers of any such corporation shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof.' Act of 1875, Chapter 611 (New York.) For doing any of these forbidden acts the officers of a corporation are made liable for its debts. No inquiry is to be made whether the creditor has been deceived and induced by deception to lend his money or to give credit, or whether he has incurred loss to any extent by the inability of the corporation to pay, nor is the recovery limited to the amount of the loss sustained. All that is necessary to show is that the act has been committed, and therefore any creditor is entitled to recover the full amount of his debt. In an action for an injury to the person or property of an individual it must be first shown that his rights have been invaded, and then the extent of the damage must be shown. It is true that in some cases the law allows a recovery far beyond the amount of actual damage as where the injury

was inflicted from fraudulent or malicious motives; but in these cases the recovery is founded on the injury to rights of person or property, and the circumstances which justify an exceptional measure of damages must be proved in evidence. There is a very marked and obvious difference between these cases, and a case where a statute enacts that because of the commission of a certain act, without reference to any other circumstance, a party shall incur a liability." Let us examine a little more closely the features of this "very marked and obvious difference."

We take it that by the phrase "action for an injury to the person or property of an individual," the Judge does not mean to limit the actions with which comparison is had to any particular class of common law actions; otherwise the comparison would be idle as an argument. He means to say, as we understand it, that the difference between the action on the statute and such actions *in tort*, or arising from violations of law as are universally treated as civil actions, is marked by two features—(1) that in the latter "it must be first shown that his rights have been invaded," or to state it again, that "in these cases the recovery is founded on the injury to rights of person or property;" (2) that in them "the extent of the damage must be shown," or in cases where punitive damages are given, "the circumstances which justify an exceptional measure of damages must be proved in evidence."

(1) The *petitio principii* of the first statement in either form will be found in the word *"rights."* The word rights has no meaning of itself, but is a relative word. A right in an individual implies a duty resting on another individual or all other individuals to do or to refrain from doing some act, and implies further that the individual having the right and to whom the duty is owing may enforce the performance of the duty, or punish the violation of his right, by aid of the sovereign through the courts. Rights are the creatures of law, statute as well as common. The statute of New York in question here imposes duties on the officers of a corporation and confers

corresponding rights on the creditors of the corporation who deal with it during the term of those officers. Here is a duty resting on determinate persons and power given other determinate persons to enforce that duty through the courts. What more is needed to complete the definition of a right? We shall return to the discussion of rights when we come to state our line of distinction between civil actions and penal actions. We take up now the second feature of difference stated in the opinion of the court below.

(2.) The case put in argument to the court below, by way of instance, was an action of slander for words imputing a crime. In such a case the law presumes malice, presumes damage, and lets the jury award damages in their discretion, to punish the defendant's act and deter its repetition. We confess that we cannot discern the line of distinction which the court below seeks to draw between that case and this. Suppose the speaking of certain words were made actionable *per se*, by the code of a State, in the same manner as words imputing a crime. The measure of damage in many actions is prescribed by acts of Parliament, which are part of the common law in many of the States. The statute of 6 Edw. I, cap. V, fixed the damages for waste at "thrice so much as the waste shall be taxed at." Alexander's British statutes, in force in Maryland, page 83, (Prescott vs. Mevers, 4 Mason, 326); 11 H. 6, cap. V, gave the recovery of the place wasted and treble damages (Alexander, p. 243; Parrott vs. Barney, Deady, 405; 1 Sawyer, 423), 2 W. & M., cap. V, regulating sales of distress, gave treble damages against the owner for breach of the pound, and double damages against the landlord where no rent was due (Alexander, p. 567; 4 George II, cap. 28; Alex. p. 704), gave double the value against the tenant holding over, 11 Geo. II, cap. 19 (Alexander, p. 731), gave the landlord double the value of goods fraudulently removed to escape distress for rent. Instances innumerable will be found in the legislation of the several States of statutes fixing the measure of damages both in actions known to the common

law and actions given by statute of the State. For instance, the Massachusetts law requires the town to maintain the highways within its limits, and gives double damages to the party aggrieved by neglect of that duty. The Supreme Court of that State has declared the statute remedial. Reed vs. Northfield, 13 Pick. 94; Palmer vs. York Bank, 18 Me. 166; Boyce vs. Wabash Railway Company, 63 Iowa, 70.

The opinion below seems to intimate that the New York law could be distinguished as penal, because it does not require proof that the creditor's loss is a natural and proximate consequence of the making of the false certificate or report. "No inquiry is to be made whether the creditor has been deceived and induced by deception to lend his money or to give credit, or whether he has incurred loss to any extent by the inability of the corporation to pay, nor is the recovery limited to the amount of the loss sustained."

Opinion, Record, p. 22.

Of course the creditor must prove that his debt is still unpaid, and that the certificate, report or public notice was false in some material particular; but the statute does not require proof to connect causatively the false representation with the making of the debt or the failure to collect it. Presumably the Legislature knew that such a requirement would afford opportunities for the defendant to escape liability so ample as to make the statute a dead letter. But is the absence of this requirement a feature which distinguishes this statute?

The effect of the law is to create a relation between the act and the recovery such as would be called a "conclusive presumption," if created by judicial decision instead of by statute. Such statutory provisions have been known to our law certainly since the statutes of Westminster the Second, cap. 11, (13 Edw. I,) and 1 Rich. II, cap. 12. The provision of the latter statute is as follows: "It is ordained and assented that from henceforth no warden of the fleet shall suffer

any prisoner there being by judgment at the suit of the party to go out of prison by mainprise, bail, nor by baston, without making gree to the said parties of that whereof they were judged unless it be by writ or other commandment of the King upon pain to lose his office, and the keeping of said prison; and, moreover, if any such warden from henceforth be attainted by due process, that he hath suffered or let such prisoner to go at large against this ordinance, then the plaintiffs shall have their recovery against the same warden by writ of debt." Under these statutes, as a part of the common law of Rhode Island, Story I., sustained an action of debt against the sheriff of Providence county, for the escape of an execution debtor, in Steere vs. Field, 2 Mason, 486, (1822.) Under the same statutes, as part of the common law of Illinois, the U. S. Circuit Court, N. D. Illinois, sustained an action of debt against the United States marshal for the voluntary escape of an execution debtor, in Servis vs. Marsh, 38 Fed. Rep., 794, (1889.) In such actions of debt, the execution creditor recovers from the defendant the whole amount of the judgment for which the execution debtor is held, and the defendant is not permitted to prove the insolvency of the execution debtor or other facts tending to show that the plaintiff has suffered no loss by the escape.

We submit that the lines of distinction by which the court below sought to distinguish the New York statute as a penal law, cannot in fact be drawn. The distinction does not exist in the common law of England, or in that law as modified by legislation in the States of the Union.

There is one line of distinction, and only one, that can be drawn between laws penal in the sense of the maxim, "the courts of no country execute the penal laws of another," and laws creating, for reasons of State policy, statutory obligations between man and man. That distinction is the one reached by Austin (Jurisprudence, Lectures 16 and 17) through his matchless analysis of the principles of jurisprudence and the one long since made in practice by the English courts, (Stanley vs. Wharton, 9 Price, 301) adopted

by Chief Justice Shaw in Reed vs. Northfield, *supra*, and followed by the Massachusetts court in Reed vs. Chelmsford, 16 Pick. 131; Gray vs. Bennett, 3 Metc., 530; Mitchell vs. Clapp, 12 Cush., 279; Daniels vs. Hart., 118 Mass., 544.

In the language of Austin, the penal law imposes an absolute duty, *i. e.*, a duty that corresponds to no right in a determinate person other than the obliged. The other creates a corresponding right in a determinate person or determinate persons to enforce the obligation. The courts express the same idea when they say that the statute is not penal or not purely penal, because it gives the recovery to the party grieved, and not to the State or to a common informer or State officer. This is the first case in which the court of any State has refused to entertain a suit on the judgment of a court of another State on the ground taken by the court below. The rule of the English courts as to foreign judgments would include the present judgment. "In England and in those States which are governed by the common law, such judgments are enforced not by virtue of any treaty nor by virtue of any statute, but upon a principle well stated by Parke, B., in Williams vs. Jones, 12 M. & W. at page 633: 'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.'" Godard vs. Gray, L. R. 6 Q. B. 147; Ronsillon vs. Ronsillon, L. R. 14 Chan. Div. 370.

This is a day of codification and legislation. The legislation of our States shows, year by year, an ever-increasing number of valuable and important rights created by statute, and not capable of classification under the common law heads. Statutes similar to that of New York exist in many States. If a man, subject to the law by residence and by the judgment of a court, may escape all liability by simply transferring his property to another State, State lines will become barriers indeed.

We confidently submit that the Federal Constitution affords protection against such a fraud upon creditors.

JOHN K. COWEN,

E. J. D. CROSS,

HUGH L. BOND, JR.,

For Plaintiff in Error.

146 U.S. 657

Office Supreme Court U. S.
FILED.
APR 16 1892
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891. No. 334.

COLLIS P. HUNTINGTON,

PLAINTIFF IN ERROR,

vs.

ELIZABETH C. ATTRILL.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN K. COWEN,
E. J. D. CROSS,
HUGH L. BOND, JR.,
For Plaintiff in Error.

COLLIS P. HUNTINGTON,
Plaintiff in Error,

vs.

ELIZABETH C. ATTRILL.

IN THE

Supreme Court

OF THE

UNITED STATES.

October Term, 1891.

No. 334.

In Error to the Court of Appeals of Maryland.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

On the 15th day of June, 1886, in the Supreme Court of the State of New York, Collis P. Huntington recovered a judgment for $100,272 against Henry Y. Attrill and another. On that judgment he subsequently instituted the present suit in equity in the Circuit Court of Baltimore City, Md., to set aside certain transfers of stock in the Equitable Gas Light Company of Baltimore City, made by said Attrill to himself as trustee of Helen F. Attrill, his wife, and of his two daughters, on the ground that the transfers were without consideration and void as in fraud of Attrill's creditors.

The Maryland Statute provides that "in no case of a proceeding in equity to vacate any conveyance or contract, or other act, as fraudulent against creditors, shall it be necessary for any creditor or plaintiff in the cause to have obtained a judgment at law on his demand, in order to the relief sought in the case, either in his own behalf or in

behalf of any other creditors who shall claim to participate in the benefit of the decree in the case," and then provides for issues out of Chancery for determining the indebtedness, if disputed. Md. Code Pub. Gen. Laws, Art. 16, Sec. 46.

The amended bill (Record, pages 1–7,) sets out the incorporation, February 29, 1880, of the Rockaway Beach Improvement Company (limited); its purposes and the amount of its capital stock, and that Henry Y. Attrill was an incorporator and a director from February 26, 1880, to July 29, 1881. (Record, pages 1 and 2.)

It then sets forth the recovery of the judgment by the plaintiff against said Attrill, in the Supreme Court of New York, June 15, 1886, which judgment is still in full force and virtue, and has never been paid, satisfied or secured, and proceeds to state the nature of the cause of action on which that judgment was recovered, and how and when it arose, showing that the plaintiff's cause of action against Attrill accrued by reason of the signing of a false report by the latter as a director, June 30, 1880, whereby said Attrill became under the New York statute, directly and individually liable to the plaintiff for a debt contracted by the corporation June 15, 1880. (Record, pages 2 and 3.)

The bill further alleges that the corporation was declared insolvent and dissolved March 8, 1882, in a proceeding by the State of New York; that at the time of its dissolution, the corporation was indebted to the plaintiff and others to an amount far in excess of its assets; and that Attrill was, at that time, and at the date of the transfers of stock hereafter mentioned, liable as a stockholder for the debts of the corporation to the aggregate amount of $340,000, and was also at both said times liable as a director for debts of the corporation to an amount in excess of the whole value of his property. (Record, page 3.)

It is further alleged that Attrill was, in March, 1882, and has ever since, remained indebted individually to a large

amount, in addition to his obligation as a director and as a stockholder in the said defunct corporation, and that he is insolvent and has secreted and concealed all his property for the purpose of defrauding his creditors. Execution was issued on the plaintiff's judgment in New York and returned unsatisfied, there being no property on which to levy. (Record, page 4.)

In the month of April, 1882, Attrill received a large amount of stock in the Equitable Gaslight Company of Baltimore City, a corporation incorporated by the Act of Maryland of 1867, chapter 132, and immediately, on the 14th of April, 1882, transferred 1,750 shares of said stock to himself as trustee for his wife and children respectively. At the time of these transfers both the plaintiff and Attrill were domiciled and resident in New York; and the transfers themselves were made in New York, where the principal and transfer office of the company was located and its books kept; where its officers resided, and where all its stock was transferable and transferred. (Record, pages 5 and 6.)

The bill charges that these transfers were made without valuable consideration, and with the specific intent to "delay, hinder and defraud Attrill's creditors, and especially with the intent to delay, hinder and defraud the plaintiff of his lawful suits, actions, debts and demands, arising out of the plaintiff's said claim against Attrill as a stockholder of said Rockaway Beach Improvement Company, Limited, and out of the cause of action on which the judgment hereinbefore recited was recovered; and that said transfers were, by the laws of the State of New York, as well as by those of the State of Maryland, fraudulent and void as against the creditors of the said Attrill, including the creditors of the said Rockaway Beach Improvement Company, Limited, and were and are fraudulent and void against this plaintiff."

The substance of the relief prayed for is "that the said 1,750 shares of the capital stock of said corporation may

be decreed to be subject to the claim of this plaintiff on the judgment aforesaid, and the same may be ordered to be sold," etc.

This, then, is a suit brought by the holder of a judgment debt to set aside transfers made by the judgment debtor prior to the recovery of the judgment and to the bringing of the suit in which the judgment was recovered.

The plaintiff claims the right to have the transfers of stock set aside:—

First. On the ground that, at the time of the transfers, he had a just and lawful action, suit, debt or demand against Attrill, and that the transfers were made with the intent to hinder, delay and defraud him thereof.

Second. On the ground that he is a creditor holding a debt of record; that the transfers were fraudulent in fact, having been made with the specific intent and purpose to defraud all Attrill's creditors as that time, viz.: creditors to whom he was and still is indebted on his individual account; creditors to whom he was indebted to the amount of $340,000 as a stockholder in the Rockaway Beach Company, and creditors to whom he was indebted as a director in said company; and that, therefore, the plaintiff is entitled to have the transfers set aside without regard to the time when he became a creditor of Attrill.

Under the Maryland decisions a conveyance *fraudulent in fact* may be attacked by subsequent creditors. Such a conveyance is void *ab initio*, and the property sought to be conveyed remains part of the grantor's estate subject to satisfy his subsequent debts as well as those existing at the date of the conveyance.

Swan et al. vs. Dent, 2 Md., ch. 105–6. (The notes in Brantly's edition collect the cases.)
Waters vs. Dashiell, 1 Md., 470.
Strike vs. McDonald, 2 H. & G., 261.
Spirett vs. Willows, 3 DeGex, J. & S., 293,

Third. On the ground that the conveyances in question are governed by the law of New York, and by that law are void as in fraud of the plaintiff and other creditors.

B. & O. R. R. Co. vs. Glenn, 28 Md., 322.

ASSIGNMENT OF ERROR.

With the amended bill, and as part thereof, was filed the exemplified copy of the judgment and proceedings of the Supreme Court of the State of New York, duly certified under the Act of Congress of 1790 (Record, pages 10-20.)

The defendant, Elizabeth C. Attrill, filed a demurrer to the bill, alleging for cause of demurrer, (Record, page 8):

"1. That the bill shows that the claim of the plaintiff is for the recovery of a penalty against the defendant, Henry Y. Attrill, arising under a statute of the State of New York.

"2. Because the amended bill does not state a case which entitles him to any relief in a Court of Equity in this State."

This demurrer was overruled by the Circuit Court; but on Appeal, the Court of Appeals of the State of Maryland reversed the order of the Circuit Court and dismissed the bill (Record, page 21.) To review that judgment the present writ of error has been sued out (Record, page 29) on the ground that the plaintiff in error claims a right and privilege, under the Constitution and statutes of the United States, and the decision of the Maryland Court of Appeals is against the right and privilege so set up and claimed by him, and that in said suit there is drawn in question the validity of a statute of and authority exercised under the United States, and the decision is against the validity of such statute and of such authority.

The Act of Congress, passed in pursuance of section 1 of Article 4 of the Constitution, provides that the records and judicial proceedings of each State court, where properly authenticated, "shall have such faith and credit given to them, in every Court within the United States, as they

have by law or usage in the courts of the State from whence said records are or shall be taken."

The plaintiff in error brings suit in the proper Court of Maryland, on a judgment of the Supreme Court of New York, which is admitted to be the judgment of a Court of Record having jurisdiction of the parties, in full force and virtue in New York, and never paid, satisfied or secured.

Thereupon the Court of Appeals of Maryland dismisses the suit, on the ground that the judgment of the New York Court does not constitute a cause of action in a Maryland Court. If there could ever have been a doubt that the decision of the Maryland Court of Appeals denies the plaintiff-in-error a right and privilege secured to him by the Constitution and statutes of the United States, the doubt has been removed by the decision of this Court in Christmas vs. Russell, 5 Wall., 290. In that case the Legislature of Mississippi had enacted that no action should be maintained in the Mississippi Courts on a judgment recovered against a citizen of Mississippi in the Court of another State, when the cause of action on which such judgment was recovered had been barred by the Mississippi Statute of Limitations at the time suit was brought in such other State. *Held,* that to refuse to sustain a suit on a judgment recovered in Kentucky on such a cause of action, was to deny it the "effect" required by the Act of Congress, and that the Mississippi statute was unconstitutional and void.

The Maryland Court of Appeals committed the same error in this case as did the Mississippi Court in Christmas vs. Russell.

ARGUMENT.

1.—The Federal Question is the only one on which the Court below did or could base its Judgment.

By reference to the opinion of the Court (Record, pages 21-25,) it will be seen that the majority of the Court of Appeals deal simply and solely with the question whether

the New York judgment constitutes a cause of action in any Maryland Court. The decision would be as applicable to an action of debt on the judgment as to the present suit in equity.

The conclusion of the majority of the judges is epitomized in the concluding sentence of the opinion, thus: "Upon the whole it appears to us that the complainant has no cause of action which he can maintain in this State."

Two of the ablest members of the Court dissented upon the express ground that the question was a Federal one, and its decision must be governed by the decisions of this Court rather than by those of the State Courts. (Record, page 26.)

It appears, affirmatively, therefore, that the Federal question was actually decided by the Court below, and that the decision of that question, dissociated from the character of the present action and the relief sought therein, determined the judgment of the Court. Having decided that the plaintiff was not a creditor of Attrill at all, the Court did not even touch the remaining points, viz: Whether the validity of the transfers of stock in question was to be governed by the law of New York, where they were made, or by the law of Maryland; whether the plaintiff could claim as a contemporaneous creditor, and whether he could claim as a subsequent creditor. These questions arise from the character of the proceedings and the relief prayed.

The Court below decided that in no proceeding and for no form of relief could the plaintiff in error obtain the aid of a Maryland Court.

2. *Does the maxim of International Law, "The Courts of no country execute the Penal Laws of another," apply to deprive the judgment sued on of the "effect" guaranteed by the Constitution?*

The *case of Wisconsin vs. The Pelican Insurance Company*, 127 U. S. 265, was a suit brought originally in this

Court by the State of Wisconsin on a judgment recovered in its own Courts against the Insurance Company, a corporation of Louisiana, for penalties imposed by a statute of Wisconsin upon foreign insurance companies failing to make returns to the Insurance Commissioner of the State. The main question was whether such an action was within the original jurisdiction of this Court. The decision holds:

(1) That the original jurisdiction of this Court in cases to which a State is a party, extends only to controversies of a *civil nature.*

(2) The suit of the State of Wisconsin is not a suit of a civil nature, and the fact that the suit is brought on the judgment recovered by Wisconsin in her own Court, does not alter its character as a suit of a penal (in the sense of criminal) nature.

(3) The provisions of the Constitution and of the Act of Congress by which the judgments of the Courts of any State are to have such faith and credit given to them in every Court within the United States, as they have by law or usage in the State where they were rendered, do not operate to give the Supreme Court original jurisdiction of a suit on a judgment of a criminal nature.

Mr. Justice Gray, delivering the opinion of the Court, says, page 289:

"The grant" (U. S. Const., Art. 3, Sec. 2) "is of 'judicial power,' and was not intended to confer upon the Courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all. By the law of England and of the United States the penal laws of a country do not reach beyond its own territory, except when extended by express treaty or statute to offenses committed abroad by its own citizens, and they must be administered in its own Courts only, and can not be enforced by the Courts of another country. Chief Justice

Marshall stated the rule in the most condensed form as an incontrovertible maxim, 'The Courts of no country execute the penal laws of another.'"

The whole question in the present case turns upon the definition and scope of the rule stated by Chief Justice Marshall.

Does the plaintiff in error ask the Maryland Court to execute the "penal laws" of New York within the meaning of that rule?

The definition of the rule by this Court in Wisconsin vs. Pelican Ins. Co., does not include the present suit. Mr. Justice Gray, at page 290 of the opinion, says: "The rule that the Courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits *in favor of the State*, for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

Again at page 299, he says: "The statute of Wisconsin, under which the State recovered in one of her own Courts the judgment now and here sued on, was in the strictest sense a penal statute imposing a penalty upon any insurance company of another State doing business in the State of Wisconsin without having deposited with the proper officers of the State a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offense committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State, and be paid, one-half into her treasury and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offense. It is immaterial whether by the law of Wisconsin the prose-

cution must be by indictment or by action, or whether under that law a judgment there obtained for the penalty might be enforced by execution by *scire facias*, or by a new suit. In whatever form the State pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense."

In Dennick vs. Railroad Company, 103 U. S., 11, Mr. Justice Miller delivering the opinion (page 17), says of the "death statute" of New Jersey: "It can scarcely be contended that the act belongs to the class of *criminal* laws which can only be enforced by the Courts of the State where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury."

The argument for the defendant-in-error is simply a play on the word "penal." The learned counsel state the maxim "the courts of no country execute the penal laws of another." They then cite (1) cases which lay down the rule that no action can be maintained in another State on the New York statute or one similar (e. g. Flash vs. Conn, 109 U. S., 371), (2) cases which involve the rule of construction to be applied to such statutes, and which hold that they are to be strictly construed (e. g. Steam Engine Co. vs. Hubbard, 101 U. S., 188; Chase vs. Curtis, 113 U. S., 452), and (3) cases which hold that the repeal of such a statute, without saving actions pending thereunder, abates such actions (e. g. Union Iron Co. vs. Pierce, 4 Bissell, 327). In these cases the statutes in question are characterized by the word "penal." The citations are supposed to demonstrate that statutes such as the New York Corporation Law are "penal laws," within the meaning of the maxim of international law. We contend that before such a conclusion follows, it is necessary to show further that the word "penal," as used in the cases cited, is used in exactly the same sense as in the maxim. Every one

knows that the word "penalty" has many meanings, or shades of meaning, in legal phraseology. The word "penal" has equally varied shades of meaning. Mr. Morawetz, referring to the very decisions on which the argument for the defendant-in-error is based, says:

"It is not always quite clear what the Courts mean to express by saying that Statutes of this character are 'penal,' and that they impose upon the directors a 'penal liability.'

"The liability of the directors under such a statute is undoubtedly not the result of a contract between the directors and the creditors of the corporation; but that is evidently not what the Courts mean to express. The liability of directors to creditors for a tort, or a misapplication of corporate funds, or breach of trust, does not arise out of contract; yet the Courts would certainly not call this a penal liability, or refuse to enforce it because it arose under the laws of a foreign State.

"Nor is the liability of the directors under these statutes penal in the sense in which the word 'penal' is used in criminal law; it is not a penalty or fine imposed by the State for the infraction of a public law.

"The liability of the directors is both in form and in substance a private obligation, similar in many respects to that of sureties. It is imposed by the Legislature, partly for the purpose of inducing the directors to do their prescribed duties, and partly for the purpose of securing the company's creditors from losses caused by the acts of those who have control over the company's fortunes. The statutes imposing this liability establish a new rule of private right—a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called penal appears to be that it does not exist at common law, and is neither created by contract nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company."

2 Morawetz on Corporations, sec. 908 *et seq.*

The author then cites at length the opinion of the Supreme Court of Georgia in the case of Neal vs. Biggs, 12 Ga. 104, 111–113.

The cases on which our opponents rely in great part, involved the question whether such a statutory obligation as that imposed by the New York Corporation Law could be sued on directly in the Courts of another State. To make clear the scope of those decisions and the meaning of the word "penal" as therein used to characterize such statutes, it is necessary to sketch briefly the history of the law of remedies as applicable to causes of action arising outside the realm.

The Courts of England maintain a suit on a contract wherever made, and enforce it agreeably to the law which the parties intended should govern it, provided that in so doing no rule of public policy or good morals be violated. The foreign law is regarded, not because it has any force in England as a command of a sovereign, but because the questions of contract or no contract, and of the meaning and effect of the contract, can be decided only by reference to that law. So it is that liabilities *ex contractu* are enforced in the Courts of England and the United States to-day.

Under the early common law, by reason of the rules as to *venue*, no action either in contract or tort lay in an English Court on matters happening outside the realm. Only after the invention of the legal fiction by which a false *venue* was alleged, and no traverse of the allegation allowed, could such an action be maintained.

Stephen on Pleading, 280–281.

Then was drawn the distinction between local and transitory actions, the former being defined as actions in which all the principal facts are local; the latter as actions in which any principal fact is transitory.

Stephen, *supra*.

Livingston vs. Jefferson, 1 Brock, 203.

Under the fictitious *venue*, any liability *ex delicto* of a transitory nature, arising from acts in a foreign country, could be sued on in English Courts, provided the acts constituted a *tort* at common law.

McKenna vs. Fisk, 1 How. 241, 248.

The allegation of fictitious *venue* went out of use, but the Courts retained their jurisdiction of wrongs committed abroad, by virtue of a *presumption* that the common law was in force universally.

Allen vs. R. R. Co., 45 Md. 41.

That presumption may now be rebutted to the extent of proving authority for the act under the foreign law, so that the English Courts refuse to-day to sustain an action for wrongs committed in a foreign country, (1) if the cause of action be *local* by the law of England; (2) if the wrong would not have been actionable had it been committed in England; and (3) if though actionable by English law, it is justifiable by the laws of the place where committed.

Phillips vs. Eyre, L. R. 6 Q. B. 128, 129.

When the States of the United States received as their heritage the common law of the mother country, they received as a part thereof the principle that wrongs committed abroad which would support a transitory action in tort at common law, could be sued on in their Courts, by virtue of the presumption that the common law was the law of the foreign country also.

Equally did they receive the principle that no other wrongs committed abroad could be sued on in their Courts, because the presumption extended to none other.

The effect of the distinction whose origin we have outlined, is to exclude from the Courts of other States all causes of action *ex delicto*, created by the statutory law of the State as distinguished from the common law; and conversely acts not actionable at common law, committed in another State, will not be actionable, although by the

statute law of the *forum* they would be actionable if committed therein. The distinction is between statutory liabilities not *ex contractu*, and common law liabilities not *ex contractu*.

For instance, compare Mitchell vs. Harmony, 13 How. 115, in which jurisdiction was assumed of a tort to goods in Mexico, with Le Forest vs. Tolman, 117 Mass., 109, in which the Court refused to sustain an action under the Massachusetts statute for double damages against the Massachusetts owner of a dog that had bitten plaintiff in New Hampshire. If in the latter case the plaintiff had alleged that defendant knew his dog was accustomed to attack and bite mankind, so as to make out a cause of action at common law, the Massachusetts Court must have sustained the action. The present tendency is to extend the rule to agree with that of the Civil Law which grants an action in all cases when the *lex fori* and the *lex loci delicti* concur in holding that the act complained of is actionable, whether that law be statutory or common law.

Dennick vs. R. R. Co., 103 U. S., 11.
Boyce vs. Wabash Railway Co., 63 Iowa, 70.

The history of our law with reference to remedies for acts committed abroad, shows that the rule which denies a remedy for acts made actionable only by statute in the state where committed, or in the state of the suit, or in both, is a rule arising out of the history of the law of remedies, that it applies to all *statutory delicts*, and that it is an entirely separate and distinct rule from that by which the Courts of one country refuse to punish criminally acts committed in another. Acts committed abroad will not be punished *criminally*, whether they be crimes at common law or not.

In the earlier cases in this country the distinction was not drawn between the stockholder's liability, under a statute for debts of the company to an amount equal to his stock, or that of the stockholders jointly and severally

for all debts, until full payment of stock (which have since been held enforceable in another state, because arising *ex contractu*) and the liability of stockholders or directors, arising by reason of a failure in the performance of a duty imposed by statute. The liability of the stockholders, whether to the amount of their respective stock only, or jointly and severally for all the debts until full payment of the capital stock, &c., was distinguished from the liability of the original contractors, and described as a "limited statute liabillty."

Erickson vs. Nesmith, 4 Allen, 233.
Andrews vs. Callender, 13 Pick. 490.
Halsey vs. McLean, 11 Allen, 442, 443.

In Halsey vs. McLean it was sought to hold the defendant for a debt of the corporation, both as stockholder and director, under the tenth or eighteenth and twelfth sections respectively of the New York statute. The Court say (page 441): "An examination of the statute provisions relied upon by the plaintiff clearly shows that they do not leave the officers or stockholders in all cases personally liable for payment of the corporate debts. If they did, we should need carefully to consider whether under such a charter the members of the company do or do not remain in the condition of co-partners at common law. Even in that case it has been doubted whether the Courts of another state could give effect to such a remedial provision. Drinkwater vs. Portland Marine Railway, 18 Maine, 37."

These earlier Massachusetts cases adopt the broad ground that the statute system of another state, in reference to the liability of stockholders and directors of foreign corporations, will not be enforced in that state. So held also in Erickson vs. Nesmith, 46 N. H., 371, 378. They analyze the liability of stockholders and directors only to ascertain whether the corporation is primarily liable, or the members are liable as co-partners. The

Courts of New York, on the other hand, made the distinction between the liability arising *ex contractu* and that arising *ex delicto;* and this distinction has become generally recognized. Flash vs. Conn, 109 U. S., 371, where the New York cases are cited. It is in making this distinction that the Courts have characterized as a penalty the statutory liability incurred by failure to perform some act, and have spoken of the statutory provision as "penal."

The words "penal" and "penalty" in these cases are used to express two distinct qualities. Sometimes the words are employed to indicate that the obligation sought to be enforced is not an obligation *ex contractu;* sometimes to indicate that the obligation is not a common law obligation *ex delicto*, enforceable as such wherever it may have arisen, and sometimes the words are used to express both characteristics at once. We admit that in the class of cases which hold that such statutory obligations *ex delicto* cannot be sued on directly in another State, the Courts have confused the rule, arising from the law of remedies, that wrongs committed abroad are not actionable unless actionable at common law, with the rule of international law that "the Courts of no country execute the penal laws of another." The decision of the case before the Court did not require the making of the distinction No matter which rule were applicable, the decision must be the same; and so the Court cites cases under both rules in support of its decision, and uses the terms of both rules indifferently. This confusion has occurred almost as often in cases arising on the "death statutes," so called, of other States, as in those arising on corporation laws. Wharton Confl. of Laws, Sec. 480; Richardson vs. Railroad Company, 98 Mass., 85. Even this Court fell into such an inadvertence—only *obiter*, however—in Flash vs. Conn, *supra.*

That the provision of the New York Corporation Law in question is not a "penal law" within the meaning of the maxim, "the Courts of no country execute the penal laws

of another," and that this Court in characterizing the provision as penal did not use the term in the sense in which the maxim uses it, are propositions established by the action of this Court and the U. S. Circuit Courts, in cases arising on the New York law and similar statutes of other States.

As regards the *penal* laws of a State (in the sense of the maxim,) the Federal Courts sitting in that State are Courts of a foreign sovereign. They have no power to administer the criminal laws of the State. The State can therein maintain no action for a penalty; no *qui tam* action, which is a common form of criminal suit, could be brought on the statute of the State.

Wisconsin vs. Pelican Ins. Co., 127 U. S., 265.

The considerations which enable a State Court, if it chooses, to entertain a suit by the United States for a penalty imposed by Act of Congress do not apply to a Circuit Court of the United States with reference to a State statute.

Claflin vs. Houseman, 93 U. S., 133.

If, therefore, the Statute of New York be *penal*, within the letter and spirit of the rule that the Courts of one sovereign will not execute the *penal* laws of another sovereign, then no action could be maintained in the Federal Courts sitting in New York. But such actions have been entertained by the Federal Courts again and again, and that, too, with the concurrence of this Court.

Steam Engine Co. vs. Hubbard, 101 U. S., 188.
Chase vs. Curtis, 113 U. S., 452.
Union Iron Co. vs. Pierce, 4 Bissell, 327.
White vs. How, 3 McLean, 292.
Falconer vs. Campbell, 2 McLean, 195.

Steam Engine Co. vs. Hubbard came up on writ of error to the Circuit Court of the U. S. for the District of Connecticut. The suit was originally brought in the Circuit

Court by the Providence Steam Engine Co., as a creditor of the Odorless Rubber Co., a joint stock company organized under the laws of Connectieut, to recover from Chas. Hubbard, the president of the latter company, the amount of a debt due by it to the plaintiff company. The suit was based on a provision of the statute of Connecticut, which makes the president and Secretary of a joint stock company, who intentionally neglect or refuse to file the certificate therein required, showing the company's condition, &c., jointly and severally liable for all the debts of the company contracted during the period of such neglect or refusal.

Conn. Rev. Stat., sec. 404, page 172.

Held (1) That the statute is penal, and must be strictly construed. (2) The defendant is not liable, if the debt was contracted by the corporation before, although it may remain unpaid during the period when he neglected or refused to comply with the requirements of the statute.

Chase vs. Curtis, was originally brought in the U. S. Circuit Court for the Southern District of New York. The plaintiff was the holder of a judgment against the Union Petroleum Co., of New York, recovered in the U. S. Circuit Court, Western District of Pennsylvania, in an action of trespass on the case for entering upon and taking oils from the plaintiff's lands. The defendants were trustees of the Union Petroleum Co., which was a corporation organized under the New York "Manufacturing Corporation" Law of February 17, 1848, as amended June 7, 1875. The suit was founded on section 12 of the Act, which makes the trustees liable for all the *debts* of the corporation on failure to file the reports of capital and of debts required by that section. It was *held* (1) that the provision of the statute was penal, and to be strictly construed; and (2) that a judgment for a tort was not a debt within the statute.

The Circuit Courts of the United States have jurisdiction of suits in which there is a controversy between citizens of different States only when such suits are *of a civil nature.* The jurisdiction of the Supreme Court in error to the Circuit Courts rests on exactly the same provisions of the Constitution passed on in Wisconsin vs. Pelican Ins. Co., *supra.* Although the attention of the Courts below and on appeal was particularly called to the character of the respective statutes in the cases last cited, yet jurisdiction was unhesitatingly assumed in both cases by both Courts, and the cases disposed of on the merits—and this in view of the well-known rule of the Supreme Court that the question of jurisdiction will be first decided, and where that is found wanting, no opinion will be expressed on any other point.

The U. S. Circuit Court for the District of Connecticut would not entertain a suit directly on the New York law, nor would a Federal Court in New York entertain a suit on the Connecticut statute. Why? The counsel for the defendant in error answer: "Because the respective statutes are penal, and will not be enforced by the Courts of another sovereign." Not so; for if that were the reason, the Federal Court in New York could entertain a suit neither on the New York statute nor on that of Connecticut, and the Federal Court in Connecticut could entertain none. With respect to criminal statutes of both States, each Court is that of a foreign sovereign. The true reason is that the right to be enforced is a statutory one of *a civil nature,* but unknown to the common law. The Federal Court sitting in the State which enacted the statute will entertain a suit to enforce the right, under the rule laid down in Railway Co. vs. Whitton, 13 Wall. 285. The Federal Court sitting in another State will not enforce the right by suit, because it is a right conferred only by the statute. The statute has of itself no extra-territorial force, and the statutory right does not come within the rule of comity for the reasons we have stated growing out of the history of the law of remedies.

The majority opinion below attempts to distinguish the statutory provision in question here, as a penal law, as follows: "The twenty-first section of the statute is in these words: 'If any certificate or report made or public notice given by the officers of any such corporation shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof.' Act of 1875, Chapter 611 (New York). For doing any of these forbidden acts the officers of a corporation are made liable for its debts. No inquiry is to be made whether the creditor has been deceived and induced by deception to lend his money or to give credit, or whether he has incurred loss to any extent by the inability of the corporation to pay, nor is the recovery limited to the amount of the loss sustained. All that is necessary to show is that the act has been committed, and therefore any creditor is entitled to recover the full amount of his debt. In an action for an injury to the person or property of an individual it must be first shown that his rights have been invaded, and then the extent of the damage must be shown. It is true that in some cases the law allows a recovery far beyond the amount of actual damage as where the injury was inflicted from fraudulent or malicious motives; but in these cases the recovery is founded on the injury to rights of person or property, and the circumstances which justify an exceptional measure of damages must be proved in evidence. There is a very marked and obvious difference between these cases, and a case where a statute enacts that because of the commission of a certain act, without reference to any other circumstance, a party shall incur a liability." Let us examine a little more closely the features of this "very marked and obvious difference."

We take it that by the phrase "action for an injury to the person or property of an individual," the Judge does

not mean to limit the actions with which comparison is had to any particular class of commen law actions; otherwise the comparison would be idle as an argument. He means to say, as we understand it, that the difference between the action on the statute and such actions *in tort*, or arising from violations of law as are universally treated as civil actions, is marked by two features—(1) that in the latter "it must be first shown that his rights have been invaded," or, to state it again, that "in these cases the recovery is founded on the injury to rights of person or property;" (2) that in them "the extent of the damage must be shown," or in cases where punitive damages are given, "the circumstances which justify an exceptional measure of damages must be proved in evidence."

(1) The *petitio principii* of the first statement in either form will be found in the word "*rights.*" The word rights has no meaning of itself, but is a relative word. A right in an individual implies a duty resting on another individual or all other individuals to do or to refrain from doing some act, and implies further that the individual having the right and to whom the duty is owing, may enforce the performance of the duty, or punish the violation of his right by aid of the sovereign through the courts. Rights are the creatures of law, statute as well as common. The statute of New York in question here imposes duties on the officers of a corporation and confers corresponding rights on the creditors of the corporation who deal with it during the term of those officers. Here is a duty resting on determinate persons and power given other determinate persons to enforce that duty through the courts. What more is needed to complete the definition of a right? We shall return to the discussion of rights when we come to state our line of distinction between civil actions and penal actions. We take up now the second feature of difference stated in the opinion of the Court below.

(2) The case put in argument to the Court below by way of instance, was an action of slander for words imputing a crime. In such a case the law presumes malice, presumes damage, and lets the jury award damages in their discretion, to punish the defendant's act and deter its repetition. We confess that we cannot discern the line of distinction which the Court below seeks to draw between that case and this. What if the speaking of certain words were made actionable *per se*, by the code of a State, in the same manner as words imputing a crime? The measure of damage in many actions is prescribed by acts of Parliament, which are part of the common law in many of the States. The statute of 6 Edw. I, cap. V, fixed the damages for waste at "thrice so much as the waste shall be taxed at." Alexander's British statutes, in force in Maryland, page 83, (Prescott vs. Nevers, 4 Mason, 326); 11 H. 6, cap. V, gave the recovery of the place wasted and treble damages (Alexander, page 243; Parrott vs. Barney, Deady, 405; 1 Sawyer, 423), 2 W. & M., cap. V, regulating sales of distress, gave treble damages against the owner for breach of the pound, and double damages against the landlord where no rent was due (Alexander, page 567); 4 George II, cap. 28 (Alexander, page 704), gave double the value against the tenant holding over; 11 George II, cap. 19 (Alexander, page 731), gave the landlord double the value of goods fraudulently removed to escape distress for rent. Instances innumerable will be found in the legislation of the several States, of statutes fixing the measure of damages both in actions known to the common law and actions given by statute of the State. For instance, the Massachusetts law requires the town to maintain the highways within its limits, and gives double damages to the party aggrieved by neglect of that duty. The Supreme Court of that State has declared the statute remedial. Reed vs. Northfield, 13 Pick. 94; Palmer vs. York Bank, 18 Me. 166; Boyce vs. Wabash Railway Company, 63 Iowa, 70.

The opinion below seems to intimate that the New York law could be distinguished as penal, because it does not require proof that the creditor's loss is a natural and proximate consequence of the making of the false certificate or report. "No inquiry is to be made whether the creditor has been deceived and induced by deception to lend his money or to give credit, or whether he has incurred loss to any extent by the inability of the corporation to pay, nor is the recovery limited to the amount of the loss sustained."

Opinion, Record, page 22.

Of course the creditor must prove that his debt is still unpaid, and that the certificate, report or public notice was false in some material particular; but the statute does not require proof to connect causatively the false representation with the making of the debt or the failure to collect it. Presumably the Legislature knew that such a requirement would afford opportunities for the defendant to escape liability so ample as to make the statute a dead letter. But is the absence of this requirement a feature which distinguishes this statute?

The effect of the law is to create a relation between the act and the recovery such as would be called a "conclusive presumption," if created by judicial decision instead of by statute. Such statutory provisions have been known to our law certainly since the statutes of Westminster the Second, cap. 11, (13 Edw. I,) and 1 Rich. II, cap. 12. The provision of the latter statute is as follows: "It is ordained and assented, that from henceforth, no warden of the fleet shall suffer any prisoner there being by judgment at the suit of the party to go out of prison by mainprise, bail, nor by baston, without making gree to the said parties of that whereof they were judged, unless it be by writ or other commandment of the King upon pain to lose his office, and the keeping of said prison; and, moreover, if any such warden from henceforth be attainted by due

process, that he hath suffered or let such prisoner to go at large against this ordinance, then the plaintiffs shall have their recovery against the same warden by writ of debt." Under these statutes, as a part of the common law of Rhode Island, Story, J. sustained an action of debt against the sheriff of Providence county, for the escape of an execution debtor, in Steere vs. Field, 2 Mason, 486, (1822.) Under the same statutes, as part of the common law of Illinois, the U. S. Circuit Court, N. D. Illinois, sustained an action of debt against the United States Marshall for the voluntary escape of an execution debtor, in Servis vs. Marsh, 38 Fed. Rep., 794, (1889.) In such actions of debt, the execution creditor recovers from the defendant the whole amount of the judgment for which the execution debtor is held, and the defendant is not permitted to prove the insolvency of the execution debtor or other facts tending to show that the plaintiff has suffered no loss by the escape. An action on the case would also lie against the sheriff for failure in his official duty. In such an action only the actual damages could be recovered.

Servis vs. Marsh, 38 Fed. Rep. 794.
Steere vs. Field, 2 Mason, 497, 501 and 513.

We submit that the lines of distinction by which the Court below sought to distinguish the New York statute as a penal law, cannot in fact be drawn. The distinction does not exist in the common law of England, or in that law as modified by legislation in the States of the Union.

There is one line of distinction, and only one, that can be drawn between laws penal in the sense of the maxim, "the Courts of no country execute the penal laws of another," and laws creating, for reasons of State policy, statutory obligations between man and man. That distinction is the one reached by Austin (Jurisprudence, Lectures 16 and 17) through his analysis of the principles of jurisprudence.

In the language of Austin, the penal law imposes an absolute duty, *i. e.*, a duty that corresponds to no right in

a determinate person other than the obliged. The other creates a corresponding right in a determinate person or determinate persons to enforce the obligation.

This line of distinction is that adopted by this Court, in Wisconsin vs. the Pelican Insurance Co., *supra*. That case has been followed in England, after a full consideration of the whole subject, by the Judicial Committee of the Privy Council.

Mr. Huntington sought to enforce in Canada this same judgment against Attrill. The judges of the Court of Appeals of the Province of Ontario were equally divided on the question whether an action upon the judgment was maintainable by Huntington in the Courts of the Province. The Court below had decided against Huntington, and he carried the case on appeal to the Queen in Council. The case was treated as a new one governed by no prior decision, and was most elaborately argued and carefully considered. The unanimous opinion of the Judicial Committee, consisting of the Lord Chancellor, Lord Watson, Lord Bramwell, Lord Hobhouse, Lord Morris and Lord Shand, was delivered February 17th, 1892. The opinion is published in 8 Times L. R,, 341. It sustain's Huntington's right to maintain an action in the Courts of Canada on this New York judgment, and holds that a proceeding, in order to come within the scope of the rule of private international law—"The Courts of no country execute the penal laws of another"—must be in the nature of a suit in favor of the State whose law has been infringed. In the appendix to this brief we print a full abstract of their Lordships' opinion taken from the London Times of February 18th last.

We believe the present case is the first in which the Court of any State has refused to entertain a suit on a judgment such as this, recovered in the Courts of another State.

This is a day of codification and legislation. The legislation of our States shows, year by year, an ever-increasing number of valuable and important rights created by statute, and not capable of classification under the common law heads. Statutes similar to that of New York exist in many States. If a man, subject to the law by residence and by the judgment of a court, may escape all liability by simply transferring his property to another State, State lines will become barriers indeed.

We confidently submit that the Federal Constitution affords protection against such a fraud upon creditors.

JOHN K. COWEN,

E. J. D. CROSS,

HUGH L. BOND, JR.,

For Plaintiff in Error.

APPENDIX.

LAW REPORT, Feb. 17.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(*Present—The* LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, *and* LORD MORRIS.)

HUNTINGTON V. ATTRILL.

This was an important appeal from a judgment of the Court of Appeal of the Province of Ontario, Canada, of January 13, 1891, dismissing an appeal from a decision of Mr. Justice Street. The action was brought by the appellant, Mr. Collis P. Huntington, of New York, against Mr. Henry Y. Attrill to recover the sum of $100,240, being the amount of a judgment recovered by the appellant against the respondent in 1886 in the Supreme Court of the State of New York. The substantial question in the appeal was whether an action upon that judgment was maintainable by the appellant in the Courts of the Province of Ontario, the respondent being within the jurisdiction of such Courts.

The case was argued before the Christmas vacation before a board consisting of the Lord Chancellor, Lord Watson, Lord Bramwell, Lord Hobhouse, Lord Morris, and Lord Shand, when their Lordships reserved judgment.

Sir Horace Davey, Q. C., Mr. Finlay, Q. C., and Mr. Pollard were counsel for the appellant; the Attorney-General, Mr. Gore, and Mr. Askwith for the respondent.

To-day a motion was made in the suit for directions. The matter had arisen in consequence of the death of the respondent since the argument on the hearing of the appeal.

After a short discussion upon the course to be adopted in the circumstances,

Lord Watson asked whether there would be any harm in their lordships' pronouncing their opinion and leaving it to the parties hereafter to take the usual steps to perfect the record.

Their lordships, having heard counsel on both sides, determined that they would not defer pronouncing the nature of the report which they were prepared to make to her Majesty—the Lord Chancellor pointing out that what they were about to deliver was not a judgment, but simply a statement of the nature of the advice which they were prepared to give to her Majesty, and that no order in Council would be drawn up until the usual steps had been taken for perfecting the record, which had become deficient by reason of the death of the respondent. He thought that, if necessary, the parties should have an opportunity of being heard again.

Lord Watson then proceeded to deliver the opinion of their lordships. He said the appellant in June, 1880, became a creditor for money lent to the Rockaway Beach Improvement Company (Limited), which carried on business in the State of New York, being incorporated pursuant to chapter 611 of the State Laws of 1875. Section 21 of that Act provided that "if any certificate or report made, or public notice given by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof." The respondent was in June, 1880, a director, and in that capacity an officer of the company within the meaning of the statute. On the 30th of that month he, along with other officers of the company, signed and verified on oath, as prescribed by section 37, a certificate setting forth that the whole capital stock had, at its date, been paid up in cash. In

1883 the appellant instituted a suit against the respondent before the Supreme Court of New York State for the unpaid balance of his loan to the company, alleging that the certificate contained representations which were material and false, and that the respondent had incurred personal responsibility for the debt as provided by section 21. The respondent defended the action, but a verdict having been found against him, the Court, on the 15th of June, 1886, gave final judgment, ordering him to pay to the appellant the sum of $100,240. Having failed to recover payment, the appellant, in September, 1886, brought an action upon his decree in the Common Pleas Division of the High Court of Justice for the Province of Ontario, where the respondent resided. The only plea stated in defence was to the effect that the judgment sued on was for a penalty inflicted by the municipal law of New York; and that the action, being one of a penal character, ought not to be entertained by the Courts of a foreign State. Mr. Justice Street, who tried the case, being of opinion that the enactments of section 21 were strictly punitive and not remedial, dismissed the action with costs. The Judges of the Appeal Court were equally divided in opinion, the result being that the appeal taken from his decision was dismissed. The Chief Justice (Hagarty) and Mr. Justice Osler were of opinion that the statutory remedy given to the appellant as a creditor of the company, being civil only, and not enforceable by the State or by the public, was not a penal matter in the sense of international law. Mr. Justice Burton was of the same opinion, but held himself precluded from giving effect to it for reasons which he thus explained: "The Courts of the State of New York have placed an interpretation upon this particular statute in which I should not have agreed, but those decisions are the law of the State of New York, and with that we are dealing. I am of opinion, therefore, that on that undisputed expert testimony this is a penal statute there, and the judgment obtained upon it cannot be enforced here." In the conclusion thus

stated, Mr. Justice Maclennan expressed his concurrence. But the learned Judge, in that respect agreeing with the Court of first instance, and differing from the other members of the Court of Appeal, held that the enactment was in itself undoubtedly penal, inasmuch as it was "passed in the public interest, providing a punishment for an offence," and that "it makes no difference that what it exacts from the offender is given to persons who are ordinary creditors of a company in payment of their respective debts." Their Lordships could not assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the Courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the statute of 1875 in the State of New York. They had to construe and apply an international rule, which was a matter of law entirely within the cognizance of the foreign Court whose jurisdiction was invoked. Judicial decisions in the State where the cause of action arose were not precedents which must be followed, although the reasoning upon which they were founded must always receive careful consideration and might be conclusive. The Court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced, and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a Court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal. The general law upon that point had been correctly stated by Mr. Justice Story in his "Conflict of Laws," and by other text-writers; but their Lordships did not think it necessary to quote from those authorities in explanation of the reasons

which had induced Courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when those had their origin in a foreign country. The rule had its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of some one representing the public, were local in this sense, that they were only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the Courts of any other country. Their lordships had already indicated that, in their opinion, the phrase "penal actions," which was so frequently used to designate that class of actions which, by the law of nations, were exclusively assigned to their domestic *forum*, did not afford an accurate definition. In its ordinary acceptation, the word "penal" might embrace penalties for infractions of general law, which did not constitute offences against the State; it might, for many legal purposes, be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs, which was the very essence of the international rule. The phrase was used by Lord Loughborough and by Mr. Justice Buller in a well known case ("Folliott vs. Ogden," 1 H. B., 135, and "Ogden vs. Folliott," 3 T. R., 734), and also by Chief Justice Marshall, who, in "The Antelope" (10 Wheaton, 123), thus stated the rule with no less brevity than force: "The Courts of no country execute the penal laws of another." Read in the light of the context, the language used by those eminent lawyers was quite intelligible, because they were dealing with the consequences of violations of public law and order, which were unmistakably of a criminal complexion. But the expressions "penal" and "penalty," when employed without any qualification, express or

implied, were calculated to mislead, because they were capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the State in the interest of the community or by private persons in their own interest. The Supreme Court of the United States had occasion to consider the international rule in "Wisconsin vs. The Pelican Insurance Company" (127, U. S., 20 Davis, page 265.) By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon corporations carrying on business under it who failed to comply with one of its enactments. The penalty was recoverable by the Commissioner of Insurance, an official intrusted with the administration of the Act in the public interest, one-half of it being payable into the state treasury and the other to the commissioner, who was to defray the costs of prosecution. It was held that the penalty could not be enforced by the Federal Court or the judiciary of any other State. In delivering the judgment of the bench, Mr. Justice Gray, after referring to the text-books and the *dictum* by Chief Justice Marshall, already cited, went on to say:—"The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." Their Lordships did not hesitate to accept that exposition of the law, which, in their opinion, disclosed the proper test for ascertaining whether an action was penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the State whose law had been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies were presumably enacted in the interest and for the benefit of the community at large; and persons who violated those provisions were, in a certain sense, offenders against the

State law as well as against individuals who might be injured by their misconduct. But foreign tribunals did not regard those violations of statute law as offences against the State, unless their vindication rested with the State itself or with the community which it represented. Penalties might be attached to them, but that circumstance would not bring them within the rule, except in cases where those penalties were recoverable at the instance of the State, or of an official, duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter was regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community. The New York statute of 1875 provided for the organization and regulation of corporations formed for the purpose of carrying on all kinds of lawful business with the exception of certain branches therein specified. It conferred rights and privileges upon persons who chose to form a trading association and to become incorporated under its provisions with full or with limited liability; and in either case it varied and limited the rights and remedies which under the common law would have been available to creditors of the association, as against its individual members. On the other hand, for the protection of those members of the public who might deal with the corporation, the Act imposed upon its directors and officers various stringent obligations, the plain object of which was to make known, from time to time, to all concerned the true condition of its finances. Thus they were required (section 18) to publish an annual report stating the amount of capital, the proportion actually paid in, the amount and nature of existing assets and debts, the names of the shareholders and the dividends, if any, declared since last report, and (section 37) to certify the amount of capital stock paid in within 30 days after payment of the last instalment. In both cases the consequence of the report or certificate being false in any

material representation was that every director or officer who vouched its accuracy became, under section 21, liable personally for all the debts of the corporation contracted during his period of office. The provisions of section 21 were in striking contrast to the enactments of section 34, which inflicted a penalty of $100 upon every director or officer of a corporation with limited liability who authorized or permitted the omission of the word "limited" from its seal, official publications, or business documents. In that case, the penalty was recoverable "in the name of the people of the State of New York, by the district attorney of the county in which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such county." It did not admit of doubt that an action by the district attorney would be a suit in favor of the State, and that neither the penalty nor the decree of a New York Court for its amount could be enforced in a foreign country. In one aspect of them the provisions of section 21 were penal in the wider sense in which the term was used. They imposed heavy liabilities upon directors in respect of failure to observe statutory regulations for the protection of persons who had become or might become creditors of the corporation. But, in so far as they concerned creditors, those provisions were in their nature protective and remedial. To use the language of Mr. Justice Osler, they gave "a civil remedy only to creditors whose rights the conduct of the company's officers may have been calculated to injure, and which is not enforceable by the State or the public." In the opinion of their lordships, those enactments were simply conditions upon which the Legislature permitted associations to trade with corporate privileges, and constituted an implied term of every contract between the corporation and its creditors. A number of American authorities were cited in the course of the argument, which might be briefly noticed, seeing that they were made the

subject of comment in both Courts below. With one exception, they did not appear to their lordships to have a direct or material bearing upon the point raised in the appeal. In "Steam Engine Company vs. Hubbard," (101 U. S., ix, Otto, 188), the facts were these: The law of Connecticut, in the event of the president and secretary of a corporation, intentionally neglecting to issue a certain certificate, made them jointly and severally liable "for all debts contracted during the period of such neglect." Under that provision an action was brought by a creditor of the corporation against its president for a debt contracted before the period of neglect began, which remained unpaid during its continuance. There was no question as to enforcing the claim in another State. The Supreme Court of the States held that the enactment was penal, and, therefore, to be strictly construed, and also that the president was not liable, inasmuch as the debt was not contracted during the period of his default. The decision appeared to be absolutely right; but their lordships apprehended that the canon of construction applied in that case would be equally applicable to the case of a penalty stipulated by bond or in a mercantile contract. "Flash vs. Conn," (109 U. S., 2 Davis, 371), another decision of the Supreme Federal Court, was relied upon by the appellant. In that case a New York statute of 1848 had provided that, until the whole capital stock of the corporation was paid up, every stockholder should be liable to its creditors to an amount equal to the amount of stock held by them. It was decided that the claim of a creditor under that provision was contractual and not penal, and might therefore be enforced by an action at law. The result appeared to be inevitable, because the liability was not imposed in respect of failure to perform any duty prescribed by the Act, but it threw no light upon the present question. The respondent, in his argument, placed great reliance upon "Merchants' Bank vs. Bliss," (35 N. Y., 8 Tiffany, 412,) which was decided in 1866. The statute of 1848, already referred to, required

the trustees of the corporation to make a report at a stated period, and, in the event of their failure to do so, rendered them jointly and severally liable for all its debts then existing, or which might be contracted before the report was actually made. The suit was by a creditor against a defaulting trustee, and the only question raised was whether the action was for a "liability created by statute, other than penalty or forfeiture," within the meaning of the Statute of Limitations, or "for a penalty or forfeiture when action is given to the party aggrieved." The Supreme Court of New York decided that the liability belonged to the second category, and that suit was consequently barred by the lapse of three years. In another case, "Wiles vs. Suydam," (64 N. Y., 173,) the same Court held that a similar claim by a creditor, being for a statutory penalty or forfeiture, could not be joined in a declaration with a claim upon contract. Their Lordships saw no reason to question the propriety of those decisions, but it was hardly necessary to say that a delict might give rise to a purely civil remedy, as well as to criminal punishment. Although a right of action was given to the party aggrieved, it did not follow that the law of nations must regard his action as a suit in favor of the State. "Attrill vs. Huntington," (70 Maryland, 191,) was, however, an authority upon the very point raised in the appeal. During the dependence of the present action the appellant preferred a bill in equity, before the Supreme Court of the State of Maryland, to set aside certain transfers of stock by the respondent, upon the allegation that they were fraudulently made in order to defeat his claims under the decree of June, 1886. The Primary Judge granted the relief craved, but the Court of Appeal, by a majority of five judges against two, reversed his decision and dismissed the bill, holding that the decree, being for a penalty, could not be enforced beyond the limits of the State of New York. Their Lordships were constrained to differ from the reasons assigned by Mr. Justice Bryan in delivering the judgment of the majority, which did not appear to

them sufficiently to recognize the distinction, from an international point of view, between a suit for penalty by a private individual in his own interest and a suit brought by the Government or people of a State for the vindication of public law. The distinction was clearly pointed out in the opinion of the dissentient judges as expressed by Mr. Justice Stone, in whose reasoning their Lordships concurred. Being of opinion that the present action was not, in the sense of international law, penal, or, in other words, an action on behalf of the Government or community of the State of New York for punishment of an offense against their municipal law, their Lordships would humbly advise her Majesty to reverse the judgments appealed from, and to give decree in favor of the appellant, with costs in both Courts below. The appellant must have the costs of this appeal.

AN ACT TO PROVIDE FOR THE ORGANIZATION AND REGULATION OF CERTAIN BUSINESS CORPORATIONS, *Passed June 21*, 1875; *Laws of* 1875, *ch.* 611.

SECTION 1. Corporations may be organized under the provisions of this Act for the carrying on of any lawful business except banking, insurance, the construction and operation of railroads or aiding in the construction thereof, and the business of savings banks, trust companies or corporations intended to derive profit from the loan or use of money, or safe deposit companies, including the renting of safes, in burglar and fire proof vaults.

SEC. 10. The business of every corporation created hereunder shall be managed by a Board of Directors (the members of which, at their election and throughout their term of office shall be stockholders in such corporation to at least the extent of five shares, and shall hold their offices until their successors are chosen), and by such officers to be elected by and from among said Directors, as the by-laws shall prescribe. The number of directors shall be not less than five nor more than thirteen; and the number

thereof may be changed by a meeting of the owners of a majority of the whole amount of the stock of any corporation, and pursuant to notice specifying the purpose of such meeting and served as provided in section 5 of this Act, in person or by attorney duly authorized, shall be necessary to such change. A majority of the whole number of Directors shall be necessary to constitute a quorum. The Secretary shall record all the votes of the corporation and the minutes of its transactions in a book to be kept for that purpose. The Treasurer shall give bonds in such sums and with such sureties as are required by the by-laws for the faithful discharge of his duties.

SEC. 18. Every such corporation shall annually, within twenty days after the first day of January, make a report, which shall state the amount of capital, and the proportion actually paid in, the amount and, in general terms, the nature of its existing assets and debts, and the dividends, if any declared since the last report, which report shall be signed by the president and a majority of the directors, and shall be verified by oath of the president or secretary of such corporation, and filed in the office of the Secretary of State, and if any such corporation shall fail so to do, all the directors thereof shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such report shall be made. Provided, that if any director shall file with the Secretary of State, at any time within thirty days after such first of January, a certificate, verified by the oath of such director, stating that he has endeavored to have such report made and signed as aforesaid, but that the officers or a majority of the directors have refused or neglected to make and file such report; and shall append to such certificate a report containing the items aforesaid, so far as they are within his knowledge or are obtainable from sources of information open to him, which report shall be verified by him as being true to the best of his knowledge, information and belief, in that case such director shall not

be liable on account of such failure to make and file such report upon making proof of such facts in any action which may be commenced against him, upon the trial thereof. Whenever, under this section, a judgment shall be recovered against a director severally, all the directors of the corporation shall contribute a ratable share of the amount paid by such director on such judgment, and such director shall have a right of action against his co-directors, jointly or severally, to recover from them the proportion of the amount so paid on such judgment.

SEC. 19. If the directors of any such corporation shall declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, the directors voting in favor of declaring such dividend shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be thereafter contracted while they shall respectively continue in office.

SEC. 20. No loan of money shall be made by any such corporation to any stockholder therein, and if any such loan shall be made to a stockholder, the officers who shall make it, or who shall assent thereto, shall be jointly or severally liable to the extent of such loan and interest for all the debts of the corporation contracted before the repayment of the sum so loaned.

SEC. 21. *If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof.*

SEC. 22. If the indebtedness of any such corporation shall at any time exceed the amount of its capital stock, the directors of such corporation creating such indebtedness shall be personally and individually liable for such excess to the creditors of such corporation.

SEC. 25. No stockholder shall be personally liable for the payment of any debt contracted by any corporation formed under this Act, which is not to be paid within two years from the time the debt is contracted, nor unless an action for the collection of such debt shall be brought against such corporation within two years after the debt shall become due; and no action shall be brought against any stockholder who shall cease to be a stockholder in any such corporation for any debt so contracted, unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in such corporation.

SEC. 33. The corporations formed under this Act shall be of two classes, to be known respectively as:

1. Full liability companies.

2. Limited liability companies.

SEC. 34. In full "liability companies," all the stockholders shall be severally individually liable to the creditors of the company in which they are stockholders, for all debts and liabilities of such company, and may be joined as defendants in any action against the company. No execution shall issue against any stockholder individually until execution has been issued against the company and been returned unsatisfied; and whenever a judgment shall be recovered against a stockholder individually, all the stockholders shall contribute a proportionate share of the amount paid by such stockholder on such judgment, proportioned to the number of shares of stock owned by each of such stockholders, and such stockholder shall have a right of action against the other stockholders in such corporation jointly or severally, to recover from them and each of them, the proper portion due by them and each of them of the amount so paid on such judgment.

SEC. 35. In "limited liability companies" the name of the company shall in every case have as its last word, the word "limited," and every such corporation shall paint or

affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position in letters easily legible, and shall have its full name stated in legible characters in all notices, advertisements, and other official publications of such company, and in all its bills of exchange, promissory notes, checks, orders for money, bills of lading, invoices, receipts, letters, and other writings used in the transaction of the business of the corporation.

SEC. 36. Every omission of the word "limited" in the use of the name of such company shall render each and every officer or director in such company personally liable for any indebtedness, damage or liability incurred during such omission. If any limited liability company under this act does not paint or affix, and keep painted or affixed, its name, in the manner above set forth, it shall be liable to a penalty of not exceeding twenty-five dollars for such omission, for every day during which such name is not so kept painted or affixed; and every director or officer of such company who shall authorize or permit such omission shall be liable to a like penalty; and if any director or officer of such company, or any person on its behalf, shall use or authorize the use of any seal purporting to be a seal of the company on which its name is not so engraved as aforesaid, or shall use or authorize the issue of any notice, advertisement or other official publication of such company, or shall sign or authorize to be signed on behalf of such company any bill of exchange, promissory note, endorsement, check, order for money or goods, invoice, bill, receipt, letter of credit or other writing of the company wherein its name is not mentioned as aforesaid, he shall be liable to a penalty of one hundred dollars. The penalties in this section provided shall be sued for in the name of the people of the State of New York by the District Attorney of the county in which the principal office of such corporation is located, and the amounts

recovered shall be paid over to the proper authorities for the support of the poor of such county.

SEC. 37. In limited liability companies, all the stockholders shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them, respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed. The term stockholder as used herein shall apply not only to such persons as appear by the books of the corporation or association to be such, but also to every equitable owner of stock, although the same may appear on such books in the name of another person, and also to every person who shall have advanced the instalments or purchase money of any stock in the name of any person under twenty-one years of age, and while such person remains a minor to the extent of such advance, and also to every guardian or other trustee who shall voluntarily invest any trust funds in such stock; and no trust funds in the hands of such guardian or trustee, shall be in any way liable under the provisions of this act, by reason of any such investment, nor shall the person for whose benefit any such investment may be made be responsible in respect to such stock until thirty days after the time when such persons respectively become competent and able to control and dispose of the same; but the guardian or other trustee making such investment as aforesaid shall continue responsible as a stockholder until such responsibility devolves upon the person beneficially interested therein, and in respect to stock held by a guardian or other trustee under a transfer of the same by a third person, or under positive directions by a third person for such investment, the person making such transfer or giving such directions, and his executors and administrators shall, for the purpose of this act, be deemed

a stockholder; and the estate of such person, if he be deceased, shall be responsible for the debts and liabilities chargeable on such stock, according to the provisions of this Act. No execution shall issue against any stockholder individually until execution has been issued against the corporation and returned unsatisfied; and whenever a judgment shall be recovered against a stockholder individually, all the stockholders shall contribute a proportionate share of the amount paid by such stockholder on such judgment proportioned to the number of shares of stock owned by each of such stockholders, and such stockholder shall have a right of action against the other stockholders in such corporation, jointly or severally, to recover from them, and each of them, the proportion due by them and each of them of the amount, so paid on such judgment. The capital stock of every such limited liability company shall be paid in, one half thereof within one year, and the other half thereof within two years from the incorporation of said company, or such corporation shall be dissolved. *The directors of every such company, within thirty days after the payment of the last installment of the capital stock, shall make a certificate stating the amount of the capital so paid in, which certificate shall be signed and sworn to by the president and a majority of the directors; and they shall, within the said thirty days, record the same in the office of the Secretary of State, and of the county in which the principal business office of such corporation is situated.*

SEC. 38. The dissolution for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution.

146 U.S. 657

Office Supreme Court U. S.
FILED.
APR 30 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the U. S.

October Term, 1891.

No. 334.

COLLIS P. HUNTINGTON, PLAINTIFF IN ERROR,

vs.

ELIZABETH C. ATTRILL.

BRIEF OF THE DEFENDANT IN ERROR ON THE MERITS.

S. T. WALLIS,
WILLIAM A. FISHER,
for Defendant in Error.

JOHN MURPHY & CO., PRINTERS AND STATIONERS, BALTIMORE.

IN THE

Supreme Court of the U. S.

October Term, 1891.

No. 334.

COLLIS P. HUNTINGTON, PLAINTIFF IN ERROR,

vs.

ELIZABETH C. ATTRILL.

BRIEF OF THE DEFENDANT IN ERROR ON THE MERITS.

The legal grounds upon which the motion to dismiss, in this case, was based, have so much in common with those upon which the decision on the merits must depend, that the counsel for the Defendant in Error, in their brief filed when the motion to dismiss was made at the original term, were compelled to present most of the principal points upon which the final determination of the case must rest. As this was done quite fully, they do not desire, and in fact would not have the right, to trouble the Court with anything like an elaborate repetition of the views which they then had the honor to submit. The case is fully stated in the previous brief, and

the counsel for the Defendant in Error beg leave respectfully to refer the Court thereto without any restatement in detail. They still persuade themselves, respectfully, that their motion to dismiss and affirm ought to prevail, and they do not mean, by the present argument, to indicate any change in the convictions, upon that point, which they have heretofore expressed and endeavored to maintain. The only Federal question which can be asserted to exist in the case, is that supposed to grow out of the operation of Section 1 of Article 4 of the Constitution of the United States and the Act of Congress passed in pursuance thereof, whereby faith and credit are required to be given, in every Court within the United States, to the judgments of the State Courts respectively. While the Defendant in Error will respectfully contend that the case is with them, even if these provisions are found applicable, they will claim, at the same time, with great deference, that the affirmance of the decree below is required by other and quite independent considerations absolutely controlling.

The debt, for which the judgment in issue in this case was recovered against Henry Y. Attrill, was not an individual liability of Attrill; it was a debt due to the Plaintiff in Error by a New York Corporation, called the "Rockaway Beach Improvement Company Limited," of which Attrill was an incorporator and director, and to which Huntington, on the 15th day of June, 1880, advanced the sum of one hundred thousand dollars ($100,000). Attrill had entered into no personal obligation to repay the loan, and had in no way undertaken to guarantee it. He did not personally intervene in borrowing the money. His liability for its repayment was purely statutory, and was created by the corporation law of New York, which, by agreement of counsel was to be considered as set forth in the bill. (See opinion of the Court of Appeals, Rec., p. 22). The applicable Section of the New York Statute was in these words: "If any certificate or report made, or public notice given

by the officers of any such corporation shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof." It was averred, in the declaration upon which the judgment in controversy was recovered (Rec., p. 12 and 13), that Attrill had falsely and fraudulently united with the President and the majority of the Directors of the Rockaway Company, in an affidavit, required by the law, that the entire capital stock of the said Company to the amount of seven hundred thousand dollars ($700,000) had been actually paid in, in full. This affidavit (Rec., p. 13) was subscribed and sworn to on the 30th day of June 1880, *fifteen days after* the Plaintiff in Error had advanced to the corporation the moneys for which the judgment was ultimately rendered. (See the bill, Rec., pp. 2 and 4). It will thus be seen that the certificate alleged to be false, not having been executed until half a month after Huntington had made his loan of one hundred thousand dollars to the Company, could not by possibility have induced him, in any way, to make such loan, or have had any influence whatever upon his disposition to give credit to the Company. It was an act, therefore, of which he could have had no cause to complain as a personal wrong, because it in no way did him any damage. The liability to which Attrill was held was consequently a liability nakedly statutory, for which, but for the Statute, he could under no circumstances have been held to answer. This state of facts is particularly referred to here, because it is dwelt upon by the majority of the Court of Appeals of the State of Maryland in their opinion (Rec., p. 22) as furnishing a conclusive test of the purposes and character of the New York Statute. "For doing any of these forbidden acts," says the Court, "the officers of a corporation are made liable for its debts. No inquiry is to be made whether the creditor has been deceived, or induced by deception to lend his money or to give credit, or whether he has

incurred loss to any extent by the inability of the corporation to pay, nor is the recovery limited to the amount of loss sustained. All that is necessary to show is that the act has been committed, and thereupon any creditor is entitled to recover the full amount of his debt."

The Company not having paid its debt to Huntington when demanded on August 20, 1880, Huntington waited till the 23rd day of March, 1883, when he brought his action in the New York Supreme Court against Attrill and one of his brother directors, Soutter, on the sole ground, that the affidavit that the stock had been paid up was false and fraudulent, and that for that reason the directors who had united in making it were liable to him for the full amount of his loan. On the 15th day of June, 1886, Huntington recovered in that action a judgment for the sum of one hundred thousand two hundred and forty dollars and three cents ($100,240.03) with interest. The declaration in the suit will be found on pp. 11 to 13 of the Record and the proceedings are referred to and fully recited in the bill of the plaintiff in error in the present case. (Rec., pp. 2 to 4). On the 14th of April, 1882, Attrill made to himself, in trust for his wife and daughters, the transfers of stock in the Equitable Gas Light Company of Baltimore City which are impeached as fraudulent in the present proceedings. These transfers, it will be perceived, were made nearly a year before the institution of Huntington's suit in New York, and the stock so transferred (See bill, Rec. p. 5) was not acquired by Attrill until the month of April, 1882, in which he made the transfers, that is to say, not until nearly two years after the filing, in New York of the alleged false and fraudulent certificate out of which Attrill's responsibility arose. The bill therefore presents the very anomalous case of a fraud alleged to have been committed by a debtor, in conveying away, to cheat his creditors, property, which he did not acquire until the time when he so transferred it—which is equivalent

to charging that he not only made a fraudulent conveyance, but purchased the property which he conveyed for the purpose of making it. There is therefore something peculiar in the averment of the fifth clause of the bill (Rec., page 6), that the transfers by Attrill for the benefit of his wife and daughters unless annulled, will deprive the plaintiff of all rights and interests in said stock, to which he was entitled as a creditor of Attrill, at the time when said transfers were made. It is difficult to conceive what rights and interests Huntington could have had in stock which was acquired only for the purpose of immediate disposition. If Attrill had designed the transaction as a fraud, his obvious and simple plan would have been not to have acquired the stock at all. In the same connection, the Court is respectfully requested to note the emphatic averment of the bill (Article 3 on page 4) that the obligation upon which the judgment was recovered by Huntington "*arose*" when Attrill made the alleged false and fraudulent affidavit, that is to say on the 30th of June, 1880, (Rec., foot of p. 13) full fifteen days, as has been shown, *after* Huntington had loaned his money to the Rockaway Company, and its only liability to him had been incurred.

These considerations lead up to the patent fact which is somewhat dwelt upon in the previous brief (pp. 5 and 6), viz. : that the bill of the Plaintiff in Error does not proceed, at all, upon the judgment, as the foundation of the claim which it sets up. That judgment is only introduced (Rec., p. 4) for the purpose of showing the amount of the indebtedness which was ascertained by its rendition, on the 15th day of June, 1886. All of the equities set up in the bill, and all the pretensions of every sort which it asserts, are expressly grounded upon the original cause of action at law, against Attrill, under the New York Statute. Except as evidence that it was rendered, the judgment is really not in the case, and whether faith and credit be given to it or not is not practically a question in this contro-

versy, inasmuch as the amount of the indebtedness, if it exists at all, is not a subject in dispute. Having thus grounded his whole case upon the efficacy of his original cause of action, which he claims to have arisen in June, 1880 (Rec., p. 2), it clearly would have been incompetent for the Plaintiff in Error to object to the right of Mrs. Attrill to go behind the judgment, and ascertain and determine its character and nature from the cause of action on which it was founded. That she would have had a right to do this, independently of the plaintiff's being estopped, by the frame of his bill, from objecting to it, is so distinctly held in the case of Wisconsin *vs.* The Pelican Insurance Company (127 U. S. 265, 292 and 293) as to preclude further mooting of the point. In that decision, this Court not only affirmed several of its own previous rulings, but gave additional authority to the judgment of the Court of Appeals of Maryland in Evans *vs.* Sprigg (2 Md., 457) to the same effect, decided many years ago, and the doctrine of which is re-affirmed by that Court in its opinion in the present proceedings. (Rec., foot of page 24). Accepting that to be the law of this Court, which is not to be gainsaid, it seems manifest that the single question left for discussion is, whether the cause of action upon which Huntington recovered his judgment was or was not such a cause of action as the Courts of States, other than New York, could be called upon to enforce, directly or indirectly. If the nature of the judgment is to be tested by the character of the claim which it enforces, it is of course logically plain that the cause of action is the only substantial thing to be considered.

In discussing before this Court the crucial question whether the New York suit was or was not a penal action, it is not to be forgotten that the Court of Appeals of Maryland has not only held it to be so in the case now under review, but long ago established the same doctrine in the case of the National Bank *vs.* Price (33 Md., 498) in which a Pennsylvania Statute, for all legal purposes

identical with the one now before the Court, was under consideration. The decision in that case was the more emphatic, because there the Pennsylvania Statute expressly provided that the amount for which the Directors and Officers of the corporation were made liable under its provisions might be recovered "by action of debt as in other cases." This decision is especially relied upon, because it was cited with approval by this Court in Steam Engine *vs.* Hubbard, (101 U. S., 192.) Indeed the doctrine in question may be regarded as having passed into the domain of elementary text-book law. (Freeman on Judgments, Section 244.)

Assuming then that the case of the Plaintiff in Error, if vicious at all, is so because the original cause of action is vicious, and that the obtention of a judgment thereupon has not mended it or removed the vice, it will hardly be denied, that treating the judgment as out of the way, the question whether the Statute in issue is or is not a penal one, is in no sense a Federal question, but one which it is competent for the State Courts to determine for themselves. As the Court of Appeals has determined it adversely to the Plaintiff in Error, in this case, and has done so upon the strength of a well considered previous decision of its own, as well as others of the highest authority, long since rendered, it would seem, as matter of strict logic, that there is really no Federal question open in this controversy. The Court of Appeals being the Tribunal authorized to determine whether or not any particular Statute of another State is penal, in the sense which it attaches to that word, and having consequently jurisdiction to determine whether or not it will refuse to enforce the Statute of another State which it regards as penal, it would seem clear, we venture to believe, that the vital question in this case has already been decided by a competent Tribunal, whose decision, in such regard, this Court has no Constitutional power to revise.

Except in so far as their relations to each other are altered by the Constitution and laws of the United States, the Courts of the several States are, with respect to each other, foreign. It is their right to determine for themselves, upon the views of public policy formulated by themselves only, what constitutes such a penalty, under the statutes of other states, as ought not to be enforced elsewhere than in the courts of the states which have enacted them.

Upon no other conception of their authority would it be possible for them to preserve uniformity of decision, since, if the judgments of the courts of the several states enacting the statutes were accepted in place of their own, there might be many different conclusions. The only point of decision in the recent judgment of the Judicial Committee of the Privy Council in the case between the Plaintiff here and the late Mr. Attrill (of which the *Times'* report is filed with Plaintiff's brief), was that the *decisions of Canada and of England alone* were to be resorted to to ascertain whether the judgment sued upon was for such a penalty as ought to be treated as a cause of action in the Canadian Courts. Two of the judges of the Appeal Court of Canada (J. J. Burton and Maclennan) were of the opinion that the Courts of New York had placed an interpretation upon the statute which would prohibit the Courts of Canada from given any effect to the judgment. Lord Watson, on behalf of the Lords of the Privy Council Committee, said that they "could not assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the Courts of Ontario were bound to pay absolute deference to the interpretation which might have been put upon the Statute of 1875 in the State of New York. *They had to construe and apply an international rule which was a matter of law entirely within the cognizance of the foreign court, whose jurisdiction was invoked.* Judicial decisions in the state where the cause of action arose were not precedents which must be followed,

although the reasoning upon which they were followed must always receive careful consideration and might be conclusive. *The Court appealed to must determine for itself*, in the first place, the substance of the right sought to be enforced, and in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal laws of another State."

When, therefore, the Court of Appeals of Maryland determined that the Statute of New York had a penal operation, in the sense that it is punitive, and that the judgment of Mr. Huntington is, therefore, for a penalty which, under the views of public policy accepted in Maryland, ought not to be made the ground of suit in her courts, the decision was one which it might rightfully and finally make, unless its authority to do so as a "foreign court" is restricted and controlled by the first section of the fourth article of the Constitution of the United States, and of the Act of Congress of 1790.

It is impossible to give such an effect to these provisions under the interpretation which has been placed upon them by this Court.

In the case of Wisconsin *vs.* The Pelican Insurance Company, (127 U. S., pp. 291–2), the conclusion from all the previous discussion of the subject is thus stated:

"The application of the rule to the courts of the several States and of the United States, is not affected by the provisions of the Constitution, and of the Act of Congress by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered."

"Those provisions established a rule of evidence rather than of jurisdiction. While they make the record of a judgment rendered after due notice in one State conclusive evidence in the courts of another State or of the United States, they do not affect the jurisdiction either of the court in which the judgment is rendered or of

the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or National, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."

When the judgment recovered by Mr. Huntington was offered in the Maryland Court, full faith and credit were in fact given to it by treating it as evidence conclusive of Mr. Huntington's right to recover it against Mr. Attrill. The Maryland Court, however, having ascertained the nature of the cause of action for which the judgment was obtained, was at liberty to determine for itself whether it was for such a penalty, as ought to be enforced in Maryland. Thus, it is evident, that all the faith and credit have been given to the judgment required by the Constitution and the Laws, and that no federal question whatever is involved.

The position of the Defendant in Error is not weakened, to say the least of it, by the fact that the interpretation of the statute suggested by the plaintiff finds no more countenance in the jurisdiction in which the judgment was obtained, than it does in that which it is now sought to be enforced, and is essentially a criticism upon the decisions in both States.

That there is an exact correspondence between the views of the New York and Maryland Courts will appear by reference to the cases already cited, and to the following: 67 Barbour, 11–12, Price *vs.* Wilson; 2 Abbott's Pr. Rep. N. S. 61, Bird *vs.* Hayden; 17 N. Y., 466, Garrison *vs.* Home.

If the counsel for the Defendant in Error could venture to act upon their own convictions of the law, they would abstain from troubling the Court with further discussion of this case. They do not feel however that they would be doing justice to it, if they

were not to consider the contrary views which have been so ably and earnestly urged by the learned counsel for Mr. Huntington.

When this Court, in the case of Steam Engine Company *vs.* Hubbard (101 U. S., 188 and 192), after full consideration, and citing the Maryland case of the Bank *vs.* Price (33 Md., 487) in confirmation of its views, not only determined that a Statute imposing a sheer punitory liability was penal, and could only be enforced in the State where it was passed, but went further, and declared that decisions to that effect had been rendered "to such an extent as to justify the remark that the ruling is universal," it might have been supposed that the question was put at rest. Certainly the Court so treated it in the case of Flash *vs.* Conn (109 U. S., 371, 377 and 378), when it adopted the ruling of the Court of Appeals of New York in the case of Wyles *vs.* Suydan (64 New York, 173), in which that Court drew the line broadly and distinctly between cases where the Statute merely withdrew the protection of the Court from stockholders, and cases where the "liability is in the nature of a penalty imposed for neglect of duty." *A fortiori* would the latter state of case be emphasized, where the liability is affixed not merely to a neglect of duty, but, as is alleged here, to the commission of a criminal and fraudulent act. Nor could it have been supposed that these well considered and deliberate rulings were intended to be disturbed by this Court, in the case of Wisconsin *vs.* The Pelican Insurance Company, in view of the citation, with approval, in that case (127 U. S., 293), of the case of Chase *vs.* Curtis (113 U. S., 452 and 458), where the cases of Steam Engine Company *vs.* Hubbard and Flash *vs.* Conn, are both commented and relied on, and the doctrine of Wyles *vs.* Suydan, cited and approved in Flash *vs.* Conn, as to the penal character of clauses similar to the one under discussion here, is supported by citations from various leading New York cases, all uniting upon the point. The provision which was under discussion in Chase *vs.* Curtis, rendered the trustees of certain cor-

porations liable for the debts of the Company, on failure to file certain reports of capital and of debts, and this Court held that the Statute in that regard was "a penal Statute," with provisions of a highly rigorous nature.

The Plaintiff in Error nevertheless ascribes to this Court a desire to reverse its previous decisions, in the Wisconsin case, and to hold that the penal character of Statutes which renders them non-enforceable in other jurisdictions is confined to cases where the penalty for the offence is to be enforced by the State itself, either through indictment or by suit or other proceeding in the name of the State and prosecuted by its officers. This conclusion is drawn from very slender, and as it appears to us, very mistaken premises. In the Wisconsin case the action below was instituted in the name of the State, under a provision to that effect of the Statute there in controversy. Upon a judgment rendered in its favor in one of its own Courts the State of Wisconsin sued in this Court in its own name also. Practically two questions were presented, first, whether this Court could go behind the judgment for the purpose of ascertaining the nature of the cause of action upon which it was founded, and, secondly, whether that cause of action was one which gave to this Court original jurisdiction of a suit brought by a State against a citizen of another State. Upon the first of these questions the Court had no difficulty, and having gone behind the judgment, it ascertained and determined that the Statute under which the question arose was a penal Statute, for the enforcement of which the original jurisdiction of the Supreme Court could not be invoked. The Court, according to its custom, considered what was before it and nothing else, and the original action having been brought by the State, or in its name, under the local Statute, the Court, in discussing whether it was a penal law or not, considered the suit only in the light of a State prosecution. It did not go outside of the facts, for the purpose of determining, *obiter*, whether it would

have been any less a penal law, if it had provided that the identical penalty which it inflicted might be recovered by a private citizen, instead of the State or its official representative. Consequently, at the foot of page 290, the Court speaking through Mr. Justice Gray, used the following language: "The rule that the Courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits, *in favor of the State*, for the recovery of pecuniary penalties for any violation of its Statutes, for the protection of its revenue or other municipal laws and to all judgments for such penalties." This is the language from which it is argued, that this Court meant, impliedly, to abandon its previous doctrines, and to hold that no law is a penal law, incapable of extra territorial enforcement, unless the penalty imposed by it is recoverable or enforceable by the State only, or by its official representative in its name. It is respectfully submitted that the passage quoted justifies no such inference. Indeed it would be difficult to realize that this Court intended to take a new departure, upon the important question involved, without saying so in express terms, as is its wont, and without distinctly referring to and qualifying its previous decisions in the other direction. In fact, taking the passage quoted, by itself, it might seem to indicate, if literally construed, that no Statutes are penal except those where the State is not only to recover the penalty, but where, besides, the penalty is prescribed for the violation of Statutes enacted for the protection of the State's revenue, &c., &c., excluding the whole range of cases where the penalty is affixed for purposes of public policy, and where the act punished does not directly affect the revenue or property or other material interests of the State. But a short time before, in the case of the Missouri Pacific Railway *vs.* Humes (115 U. S., 512) more fully referred to on page 13 of the previous brief of the Defendant in Error, the identical question was before the Court, whether a penalty imposed by Statute

is any the less a State penalty because it is made collectable by individuals aggrieved and not directly by the State. "The additional damages," says Mr. Justice Field, for the Court, "being by way of punishment, it is not a valid objection that the sufferer, instead of the State receives them. . . . . The power of a State to impose fines and penalties for a violation of its Statutory requirements is co-eval with Government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of Legislative discretion." The case arose under a Statute of Missouri, requiring all railroads to maintain fences along their roads, and making them liable to parties injured through their failure to do so, in damages double the actual damage done. It was not denied that the State had the right to make the roads responsible for the full actual damage done, nor that the State might have directed double damages to be assessed, if the excess over the actual damage was to be paid to and recoverable by the State as a fine, but it was insisted that, to require the Roads to pay, to the private parties injured, an amount equal to double the injury done them, was to give one man's property, without consideration, to another, in violation of the Constitutional Amendment. The Court therefore had before it, as squarely and precisely as it could be presented, the question whether a penalty is any the less a penalty, because payable to individuals and not to the State, or the law any less a penal law because enforceable by private suit. After having thus deliberately determined that the intervention of the individual made no difference whatever in the nature of the Statute, and that it was alike penal in both cases, it would be a rough presumption to suppose that the Court had either overlooked so recent and leading a decision, or intended to reverse it without saying so. It would be necessary also to admit a like presumption with respect to the case of the Steam Engine Company *vs.* Hubbard, in which

this Court said, as before stated, that "repeated instances had occurred where suit was brought in one State to enforce the Statute liability for the debts of a corporation created by the legislature of another State, in all of which it is held that the Statute is penal, and that it can only be enforced in the State where the Statue was passed;" adding that the decisions had been so numerous "as to justify the remark that the rule is universal," and enforcing the proposition by the citation of a number of cases, *all of which were instances of suits by creditors of corporations to charge their officers under provisions of Statutes substantially corresponding with those of the 21st section of the New York Statute.* It is respectfully submitted that there is nothing in the context of the opinion in the Wisconsin case which gives any color to presumptions so rash and so entirely at war with the whole spirit of the decision. The recapitulation (on page 299 of that opinion) where the character of the Statute of the State of Wisconsin is discussed and determined, lends no aid to the contention on the other side. As the jurisdiction of the Court, in any event, depended upon the fact that the suit was brought by one of the States of the Union, it was necessary to treat the case from that point of view exclusively, and it cannot be legitimately inferred that the Court, because it did so, would, in a proper case between individuals, have hesitated to declare the law a penal one, if the identical penalty had been made collectable by suit of private parties.

Assuming then, as we venture to believe we have the right to do, that the New York Statute which is in controversy here is a penal Statute, under the cumulative decisions of this Court, it would be a work of supererogation to refer to the numerous rulings of other Courts all over the Union, in which the same doctrine has been established and acted on. That it is, and has for a long time been the doctrine of the State of Maryland, where the New York Statute is now sought to be enforced, has been already shown. That the Courts

of no State have adopted and enforced it more decidedly and systematically than those of New York itself, is attested by the repeated references to the decisions in that State which the Judges of this Court have made in the cases already cited from the United States Reports. To these, besides others, may be added the comparatively recent case of Langdon *vs.* New York, L. E. & W. R. R. Co. (58 Hun., 122). In that case the Railroad was sued under a Pennsylvania Statute for an alleged discrimination against the plaintiff. The Statute provided that in such cases the injured party should recover treble damages. The Court says on page 129, "the only safe and sure criterion is that of the scope and language of the Statute itself. If it has been so enacted as provide a punishment, as distinguished from an indemnity, then it should certainly be held to impose a penalty. . . . . The utmost extent to which the Courts have gone in distinguishing between an indemnity and a punishment fails to include this act, for its object is to prescribe a punishment for the violation of its provisions. And it is no less a punishment by reason of the fact that the amounts which are payable are to be recovered by the injured party."

This brings us face to face with the somewhat anomalous proposition, that the Courts of Maryland are compelled to enforce a Statute of New York, which the Courts of that State have declared to be penal, and the counterpart of which, if enacted in Maryland, the Courts of New York would not enforce, because, being penal, it would be inoperative beyond the limits of the State which enacted it. And this, too, when the Courts of the State of Maryland in the exercise of their clear right, as "foreign courts" have decided the same question, in exact conformity with the New York decisions, and mainly upon their authority, as will be seen by the opinion and citations of the Court of Appeals, in the case in 33 Md. 494, (Bank *vs.* Price) already referred to. While this Court has always reserved to itself the right to interpret and construe

State Statutes, whenever it is necessary to ascertain their true meaning and effect in order to determine whether they violate any provisions of the Constitution of the United States, its uniform practice is believed to be to accept the decisions of the State Courts, as to the meaning and effect of the Statutes of the States whose Tribunals they respectively are (Foster's Federal Practice, 558). The reason for this is of course manifest, when we consider the injustice and confusion which would necessarily arise, if the rights of suitors, claiming under the provisions of the same State Statute, were held to be one thing, if asserted in a State Tribunal, and another, and perhaps the opposite thing, if asserted in a Federal Court within the same jurisdiction.

No plausible reason can be assigned why this rule and practice of the Court should not be applied in the present case. To say that it should not be, is to antagonize the express rulings of the Court itself. In the case of Flash *vs.* Conn (109 U. S. 371) already cited, the precise point was considered and determined. The liability sought to be enforced in that case arose under the New York Corporation Statute, but the suit for its enforcement was instituted in Florida, and removed to the Circuit Court of the United States for the Northern District of that State. The point appears to have been made, that the construction put upon the Statute by the Courts of New York should not be adopted, because the case did not come up from the New York jurisdiction. After some general reasoning upon the subject, this Court, (page 379) put the question at rest in the following passage:

"If this were a case arising in the State of New York, we should therefore follow the construction put upon the Statute by the Courts of that State. The circumstance that the case comes here from the State of Florida should not leave the Statute open to a different construction. It would be an anomaly for this Court to put one

interpretation on the Statute in a case arising in New York, and a different interpretation in a case arising in Florida."

This same doctrine was acted upon in Chase *vs.* Curtis (113 U. S., 452), where, although the case came up from New York, the plaintiff was a citizen of Pennsylvania. On p. 458, after referring to the New York decisions, under which it was held that the Statutory clause in controversy was penal, the Court said "this rule of construction in reference to this and similar Statutory provisions has been heretofore adopted and applied by this Court. Steam Engine *vs.* Hubbard (101 U. S., 1888), Flash *vs.* Conn (109 U. S., 371)."

Now, as the New York Courts are unanimous in their assertion of the doctrine, that the Statutory clause in issue in this case is penal, *and that the Courts of other States cannot be called on to enforce it*, and as this interpretation by the New York Courts of their own Statutes has been adopted and acted upon by this Court as binding, whether the question comes up from New York or from any other State, what is there to stand between the Defendant in Error and the inevitable conclusion, that the New York doctrine will control this case, and that the plaintiff can consequently take nothing by his contention?

The counsel for the Defendant in Error, while entertaining the highest respect for their learned brethren on the other side, do not feel that it is necessary to follow them through the long train of argument, in which they have striven to prove, *a priori*, not so much that the law of this Court is not what we have endeavored to show that it is, but rather that it ought to be different. They insist that the whole argument for the Defendant in Error, resting on this Court's decisions, is simply a play on the word "penal," and that the word "criminal" describes all the cases which are not enforceable by Courts other than those of the State where the offence was committed. They cite, on p. 10 of

their brief, a passage from the opinion of this Court, delivered by the late Mr. Justice Miller, in Dennick *vs.* The Railroad Company (103 U. S., 11). The learned Justice was speaking of the New Jersey Statute, under which the personal representatives of a party, who has come to his death by the wrongful act or negligence of another, are entitled to sue for damages, and the language which he uses is as follows: "It can scarcely be contended that the act belongs to the class of *criminal laws* which can only be enforced by the Courts of the State where the offence was committed, for it is, though a Statutory remedy, a civil action to recover damages for a civil injury." It appears to have escaped the observation of the learned counsel that this language can have no reference or applicability to a case like that before the Court, this being a case where the right of action is not given for an "injury" of any sort, and where the right to recover is wholly independent of the question whether the Plaintiff has suffered any damage or loss whatsoever by reason of the act which entitles him to sue. The New Jersey Statue of which Mr. Justice Miller was speaking, in terms (103 U. S. 12) measures the damages to be recovered under it, by the "pecuniary injury," resulting from the death, to the parties who are authorized to sue. If therefore the sentence quoted has any relevancy to the question now before the Court, it would rather seem to indicate that the word "criminal," instead of being used in its narrow technical sense, was intended to indicate the distinction which the Court has so often recognized, between cases where the Statute prescribes a peculiar remedy by way of compensation, for actual injury done to the party who is to sue, and cases where the money allowed to be recovered is a naked pecuniary mulct, prescribed by the Statute, for the mere commission or omission which it is intended to punish, whether it does or does not injure anyone, in fact. When a Statute creates a new offense which never existed before, and punishes it—no matter in what way—because it is made an

offense and for no other reason, the question at once addresses itself to any man's mind—if the Statute is not "penal" in the fullest sense, and the pecuniary mulct which it entails is not a "penalty," what are they?

The counsel for the Defendant in Error do not help us in the solution of this question by quoting (Brief, page 24) the language of Austin, as defining the class of penal laws which are not enforceable outside of the States enacting them. The "penal law," says Austin, as quoted, "imposes an absolute duty *i. e.*, a duty that corresponds to no right in a determinate person other than the obliged; the other creates a corresponding right in a determinate person or persons to enforce the obligation." This line of distinction, the counsel goes on to say, is that adopted by this Court in the Wisconsin case. A very careful examination of the opinion in that case has not enabled us to perceive that it is indicated, much less adopted. That the learned author referred to would have regarded this abstract formula as furnishing a key to a controversy like the present, there is, we submit, no ground for supposing. Indeed the phrase quoted is but one of the many instances, in which the mania for what is called "analysis" has produced utterances of what is supposed to be philosophy, but is only phraseology. "Penal" laws in the sense of "criminal" laws are occupied comparatively little with the definition or imposition of duties. They are occupied for the most part in defining offences and providing for their punishment, and it is difficult to see, that where a Statute defines and punishes larceny, the duty of every citizen not to steal corresponds to no right in any determinate person not to be robbed. The moment that any person becomes the victim of the crime forbidden, he is converted by the very act of the thief, into a determinate person whose rights are violated. And then, as to the other branch of the phrase, by which the idea is sought to be conveyed, that a law is not a penal law where it creates a right in a determinate person to

enforce the obligation of obeying the law—it is rather difficult to understand, how it can be reconciled with the plain fact, that no law can execute itself, and that there must be a determinate person, usually the prosecuting attorney, or other public officer, whose duty it is made to see that criminals are brought to justice. Other things being equal—that is to say, the offences defined and the penalties affixed being the same in both cases—it would require some mental effort to realize that the same obligations and the same "absolute" duties do not exist, whether the law authorizes the penalty to be recovered by a public officer or a private individual. As in *qui tam* actions, where the informer is allowed to recover a fine or penalty prescribed for a particular offence, and to sue for himself as well as the Commonwealth, it is supposed that the cupidity of individuals will excite a peculiar zeal and effort in the prosecution of offences, so, by parity of reasoning, it may very naturally and wisely occur to Legislators, that they will best secure the infliction of the penalties which they impose for the violation of corporation laws, by allowing creditors or other private persons to sue in their own names and enjoy the fruits, if any, of the judgment. There certainly is no apparent principle which makes a law "penal" in the sense of "criminal," where the informer is entitled to recover and pocket one half the penalty, and yet holds that it is not penal, where he is permitted to recover and pocket the whole of it. The criterion is found, not in the fact that the penalty is recoverable in this way or that way, by this suitor or that, but in the fact that it is a penalty imposed for an offense, and not the enforcement of a liability or a compensation for injury.

We refer also to the following authorities sustaining the proposition that the Courts of one State or Nation will not enforce a judgment recovered in another for a Statutory penalty.

Story's Conflict of Laws, p. 620.

Wharton's Conflict of Laws, sec. 833.

Rohrer on Interstate Law, 148.
Piggott on Foreign Judg'ts, p. 209.
Blair's International Law, pp. 574-5.
Sayles *vs.* Brown, 40 Fed. Rep., 8, Circ't Ct., Md. Dist.

The language of this Court in the case of Christmas *vs.* Russell, 5 Wall., 302, has no application to the question now presented, and is limited to cases of which the State Court would ordinarily be required to accept the jurisdiction.

The Constitution of the United States and the legislation in pursuance of its provisions, relating to the administration of justice in the Courts, were framed with reference to the system of jurisprudence under which the people then lived, and it can not be admitted that an enactment intended merely to effect the rules of evidence in regard to judgments, should produce so radical a collateral result, as to divest the States of the control which they had before possessed on this subject. The Constitution of the United States did deprive the States of the regulation of many questions of policy, which had before been subject to their authority, but in no instance was it done except by language clearly directed to this end.

The cause of action in the case of Christmas *vs.* Russell was one, of which the Mississippi Court ought to have taken cognizance under the rules of international law. It was as binding and enforceable, in Mississippi as in Kentucky, and the Statute passed by the former State was obnoxious because it denied all remedy for a judgment on such a cause of action, and destroyed the obligation of a Contract by means of a Statute fraudulently assuming the form of a law for the limitation of actions. It was simply a legislative trick to substitute the limitation laws of Mississippi for those of other States, in the Courts of the latter.

It is submitted finally, that even if the Plaintiff in Error were

at liberty to maintain, inconsistently with the framework of his bill, that the judgment for the penalty prescribed by the New York Statute possesses a vitality of its own, free from the original infirmity of the cause of action itself, such vitality could not antedate the judgment, and the transfers of the stock were made at a time when the Plaintiff not only had no vested right (Cooley on Constit. Lim., 6th edit., pp. 472, 443, 445 and cases in notes), but no right of which the Courts of any State could take cognizance, and hence, in any aspect of the matter, the transfers of the stock were lawful at the time when they were made.

S. T. WALLIS,
WILLIAM A. FISHER,
for Defendant in Error.